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A Historical and Social Perspective on Brown V. Board of Education of Topeka with Present and Future Implications. Final Report.

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This study records the political, social, and legal aspects of "Brown v. Board of Education of Topeka" and other school segregation cases by means of court records, testimony, recent opinions of 60 social scientists, and interviews with the 30 judges, lawyers, witnesses, and plaintiffs who were involved. It presents specific information on the university cases in Missouri, Oklahoma, and Texas, and decisions in South Carolina, Virginia, Delaware, and the District of Columbia which preceded or were concurrent with the "Brown" decision. The legal environment of this decision, with its implications for interpreting the equal protection clause of the Fourteenth Amendment, and the role of social scientists in the case are discussed in detail. An appendix contains the statement made by the social scientists on the effects of segregation and the consequences of desegregation which was introduced into the Supreme Court as an argument for desegregation. (EF)

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FINAL REPORT

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A HISTORICAL AND SOCIAL PERSPECTIVE ON
BROWN V. BOARD OF EDUCATION OF TOPEKA
WITH PRESENT AND FUTURE IMPLICATIONS

MAY, 1968

U. S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

Office of Education
Bureau of Research

UD 007 754

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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Hugh W. Speer

May, 1968

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University of Missouri - Kansas City

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University research generally depends heavily on the help of graduate students. Mrs. Wilna Johnson, Mrs. Edna Mae Mitchell, Miss Judy Strong and Mrs. Suzan Williams Harmon devoted part of their time to this study in 1966-67. Miss Strong summarized much of the testimony. During 1967-68, Mrs. Janet Bulkley saw the project through to completion, giving attention to the many necessary details of documentation and assisting a great deal in reserach, organizing and writing.

Mrs. Margaret Gere typed the final draft, contributing not only her expertise as a secretary but her experience in a law office. Mrs. Vera White, secretary in the School of Education was of continuous help.

It is always rewarding to work in a university atmosphere where one has the stimulation of interaction with colleagues and students.

The reader will readily recognize the very significant contributions made by over sixty lawyers, judges, witnesses and social scientists who granted interviews and responded to the questionnaire. These recorded interviews, questionnaire results, and a complete set of court documents will form a unique part of the archives on civil rights in the Harry S. Truman Library.

University of Missouri - Kansas City

May, 1968

INTRODUCTION

Methods, Sources and Approach

The Perspective and Methodology

From "Black Monday" in 1954, when the Supreme Court announced the school desegregation decision, to "Black Tuesday" in 1968, when Dr. Martin Luther King was buried, the Brown v. Topeka case has been changing the main streams of American life: education, social welfare, economics, religion and the check and balance system of the government.

The decision had its prologue. During the previous fifteen years, the sustained efforts of a few Negroes, their white friends and a maturing national conscience had led to President Truman's Civil Rights Commission Report of 1948 and resulting legislation.

The Supreme Court under Hughes and Vinson had emerged from a half century of ambiguity on civil rights and decided the restricted covenant cases affecting (real estate) contracts and four university admission cases--all in favor of the Negro. The Court had "whittled away" at the Jim Crow, "separate but equal" principle established in the Plessy v. Ferguson decision of 1896.

Brown v. Topeka was the climax. When the reargument of the five public school cases grouped together under this title was heard by the Supreme Court in December, 1953, Chief Justice Warren had been on the bench only two months. Five months later, May 17, 1954, he handed down the desegregation decision for a unanimous court in what has come to be known as "the Case of the Century." Many opinions have followed this first great decision of the Warren Court, further defining individual liberties. Dr. Harry Kalven of the University of Chicago Law School has gone so far as to say, "If it had not been for the school segregation cases, I do not think that there would have been any real impetus to the Negro freedom movement." (30.)

During President Johnson's "honeymoon" period, Congress passed the Civil Rights Act of 1964. The Coleman Report on Equality of Educational Opportunity followed in 1966 and the Commission on Civil Disorders in 1968.

But, in education, de jure segregation has been replaced by de facto segregation. William L. Taylor, staff director for the report of the U.S. Civil Rights Commission of 1967 said, "We have educated a whole generation of children in schools that are inferior." Furthermore, he reported that the vast majority of the Negroes who finished high school last spring had never "...attended a single class with a single white student." (14.)

The assassination of Dr. Martin Luther King aroused a full spectrum of extreme reactions from non-violence to violence, from extreme guilt feeling to increased resistance and insulation. A reluctant Congress, representing an even more reluctant white power structure, was finally jarred into passing an open housing bill after three years of bickering and filibuster.

In Washington, the cherry blossom season of 1968 was marred by what threatened to be the early beginning of another long, hot summer.

The internal struggle became more confused and compounded by the Vietnamese war.

The Methodology

Much has been written about Brown v. Topeka. It has been approached from many angles. In this particular history, we hope to capture some of the flavor, drama, humor and attitudes that characterized the desegregation cases. We have traced the legal history and described the social context in the various settings. In addition, we have traced the major behavioral science arguments through the briefs, testimony, hearings and decisions. The story reveals an outstanding example of successful social action initiated by a relatively few professors, Negroes and their lawyers.

A problem of the magnitude and complexity of desegregation cannot be confined within the pigeonhole of any one academic department. An inter-disciplinary effort is needed; but without an organized academic task force, a multiple approach is somewhat presumptuous. We would be on safer ground to say that this is a non-legal, non-political, non-social, non-psychological, non-educational, non-history. No one with any sense of professional responsibility would claim to be expert in anthropology, law, sociology, economics, psychology, political science and education. We do not. Yet, any balanced and comprehensive treatment of the Brown v. Topeka story must draw from all these fields. Our degrees in English, Political Science and Education are really small comfort and not likely to impress the professionals in any one of the disciplines involved. In so far as we interpret, consciously or unconsciously, we do so as an unlicensed generalist who has received generous help from many distinguished specialists who were involved. They are listed below in a Roster of Participants. But the mistakes are ours. Let it be said that, without the help of the experts, the errors would have been greater and more numerous.

Generally in this history, we have let the social scientists speak for themselves, along with the lawyers and judges. There are over fifty completed questionnaires and the transcripts of over

thirty recorded interviews. The academic witnesses generally avoided the parochial lingo of their disciplines and communicated effectively to the courts and the interested public. This has facilitated our effort to make the content interesting to the student and to intelligent layman as well as to the academician.

We have collected what is a very nearly complete set of briefs, court proceedings and decisions for all five public school cases in the lower courts and the three hearings before the Supreme Court. We have summarized and quoted generously from these primary sources. In addition, we have drawn from a limited number of secondary sources, including books, journal articles and press releases of the time. It was impossible to find all the primary documents in any one place. Collecting the copies was not easy. We are grateful for special help from the Supreme Court Library, the Library of Congress, the New York Public Library, the Kansas Historical Society and our own library at the University of Missouri at Kansas City.

The Harry S. Truman Library has agreed to accept our collection for its archives. If we have achieved nothing else, we feel our time and USOE grant money has been well-spent for making these materials all so readily available in a national library for future scholars. This seems especially significant for the recorded interviews and questionnaires from some of the most distinguished lawyers and social scientists in the country. Fortunately, a very high percentage of the professional participants are still living. Nearly all of them responded to our queries, and very graciously.

Since we have made considerable use of the tape-recorded interview for this history, we feel encouraged and cautioned in our work by the following remarks made by Arthur Schlesinger, Jr., in an address before the American Historical Association entitled, "On the Writing of Contemporary History":

...Even as late as the days before the Second World War, an American professor who carried a course of lectures up to his own time was deemed rash and unorthodox. Most scholars still felt that a generation or so was required before current events underwent the sea change into history. Ancient historians demanded at least a millenium...

The increase in the velocity of history means, among other things, that the "present" becomes the "past" more swiftly than ever before...

...The new freedom of curiosity and comment exhibited in newspapers and magazines has diminished the inhibitions which once restrained academic historians from pronouncing judgment until their dramatic personae were safely dead...

(There exists) the technical need to supplement documents if we seek to recover the full historical transaction. So the contemporary historian acquires an indispensable function, if only to improve the record for the historian of the future. How can we best discharge this task? The interview is one obvious device, a method facilitated in our time by the invention of the electronic tape. We all know, of course, that an interview can be no better than a person's memory, and that nothing is more treacherous than that...¹ (15.) (Emphasis added.)

For reporting the series of events, ideas and attitudes in the desegregation cases, we had the advantage of direct involvement in the Topeka trial. We directed the school survey, gave testimony, helped secure witnesses and were present during the immediate planning by the plaintiff lawyers. We knew the principals in Kansas and through them made easier contact with some of the participants in the other four trials. Naturally, we have been able to reconstruct the events at Topeka in greater detail than at the other locations.

We are on record in the Topeka proceedings as being in favor of school integration backed by court action. We testified that:

If the colored children are denied the experience in school of associating with white children, who represent 90% of our national society in which these colored children must live, then the colored child's curriculum is being greatly curtailed. The Topeka curriculum or any school curriculum cannot be equal under segregation.

As nearly all the other witnesses, we are of the same opinion today and feel that there is even more evidence to support this view. Therefore, we must admit to the possibility of some bias, conscious or unconscious. Nevertheless we have tried to be objective in presenting the evidence and telling the story. Where

¹Reprinted from "On the Writing of Contemporary History" by Arthur Schlesinger, Jr., by permission of the author and of The Atlantic Monthly. Copyright © 1967, by The Atlantic Monthly Company, Boston, Massachusetts.

we have exercised the increasing tendency of the social scientists to interpret, we have tried to do it obviously enough for the reader to recognize it for what it is.

A great deal of controversy and interest surrounds the testimony of the experts throughout the Brown v. Toney cases. In the final chapter, we have compiled some of the main evidence and opinions concerning this issue, but without claiming to settle it. Whatever the influence of this testimony on the Court, it is an important chapter in the history of behavioral science. We have also risked some speculations about behavioral science theory and social action in the future. Mostly, however, we are selecting, summarizing, organizing and reporting.

The reader is on his own.

Roster of Participants

(Listed alphabetically with indication of the connection each had with the trials and/or this study.)

	S	W	C	Q	I
	Statement Group	Witness Group	Control Group	Questionnaire	Interview
Floyd H. Allport, Professor of Psychology, Emeritus, Syracuse University	x			x	
Gordon W. Allport, Professor of Social Ethics, Emeritus, Harvard University	x			x	
John F. Anderson, attorney, Olathe, Kansas; former Governor of Kansas					x
David Atkinson, Associate Professor of Political Science, University of Missouri-Kansas City					x
Charlotte Babcock, M.D., Professor of Psychiatry, University of Pittsburgh School of Medicine	x		x		
Roger Barker, Professor of Psychology, University of Kansas			x	x	
Bettie Belk (Sarchet), Ph.D. Whittier, California		x		x	
Viola W. Bernard, Psychiatrist and Psychoanalyst, New York City	x			x	
Paul Bowman, Executive Director, Institute for Community Studies, Kansas City, Missouri			x	x	
Wilbur Brookover, Professor of Educational Sociology, Michigan State University		x		x	x
John J. Brooks, Professor of Education, New York University		x		x	
Esther Brown, key white civil rights worker who promoted South Park, Kansas case and helped initiate Brown v. Topeka case.				x	
Jerome S. Bruner, Professor of Psychology, Harvard University	x	x		x	
McKinley Burnett, former president of NAACP chapter, Topeka, Kansas					x
Hadley Cantril, Chairman, Institute for International Social Research, Princeton, N.J.	x			x	
W.W. Charters, Jr., Professor, Center for Advanced Study of Educational Administration, University of Oregon			x	x	
Isidor Chein, Professor of Psychology, New York University	x	x		x	

	S	W	C	Q	I
Kenneth B. Clark, Professor of Psychology, City College, New York City	x	x			x
Mamie P. Clark, Executive Director, Northside Center, New York City					
Stuart W. Cook, Professor, University of Colorado-Boulder	x			x	
G. L. Cross, President, University of Oklahoma					x
Bingham Dai, Professor Psychology, Duke University School of Medicine	x			x	
Jacob A. Dickinson, former president of school board, Topeka, Kansas (after the Topeka trial)					x
Daniel W. Dodson, Director, Center for Human Relations and Community Studies, New York University		x		x	
Sterling H. Fuller, Chairman, Political Science Department, University of Missouri-Kansas City					x
Henry E. Garrett, Professor Emeritus of Psycho- logy, Columbia University		x		x	
Jacob W. Getzels, Professor, University of Chicago			x	x	
Noel P. Gist, Professor of Sociology, University of Missouri-Columbia	x			x	
Harrison Godfrey, Associate Professor of Educational Psychology, University of Missouri-Kansas City					x
Wendell Godwin, former Superintendent of Schools, Topeka, Kansas (after the Topeka trial)					x
Jack Greenberg, Director-counsel for NAACP Legal Defense and Educational Fund					x
Charles Hallam, Librarian of the United States Supreme Court					x
Robert J. Havighurst, Professor of Education, University of Missouri-Kansas City and University of Chicago					x
Robert L. Howard, Emeritus Professor of Law, University of Missouri-Columbia					x
Louisa P. Howe (formerly Holt), Assistant Pro- fessor of Sociology in the Department of Psychiatry, Harvard Medical School		x		x	
James L. Hupp, State Historian and Archivist, Charleston, West Virginia		x		x	
Walter J. Huxman, Federal District Judge, retired; presided at first court hearing of Brown v. Topeka; former Governor of Kansas					x

	S	W	C	Q	I
W. Warren Kallenback, Professor, Education, San Jose College, San Jose, California			x	x	
Harry Kalven, Jr., Professor of Law, University of Chicago					x
Father John J. Kane, Professor of Sociology, Notre Dame University		x		x	
Louis Kesselman, Professor of Political Science, University of Louisville		x		x	
Otto Klineberg, Professor of Psychology, Columbia University					
Philip B. Kurland, Professor of Law, University of Chicago					x
Bernard Kutner, Associate Professor, Albert Einstein College of Medicine, Bronx, N.Y.			x	x	
Alfred McClung Lee, Professor of Sociology, Brooklyn College of the City University of New York	x	x		x	
Daniel U. Levine, Associate Professor of Education and Director of Center for Study of Metropolitan Problems, University of Missouri-Kansas City					x
Jo Desha Lucas, Professor, Law, University of Chicago					x
R.M. MacIver, Professor of Political Philosophy & Sociology, Barnard College, Columbia	x			x	
Ernest Mannheim, Professor of Sociology, University of Missouri-Kansas City		x		x	
Thurgood Marshall, Chief counsel for NAACP Legal Division during time of trials; now Associate Justice of U.S. Supreme Court					x
Boyd R. McCandless, Professor of Educational Psychology, Emory University, Atlanta			x	x	
Alvin S. McCoy, Science Editor, Kansas City Star; formerly Kansas Editor of the Star					x
Kenneth McFarland, former Superintendent of Schools Topeka, Kansas (at the time of the Topeka trial)		x			x
Carson McGuire, Professor, University of Texas			x	x	
Harold McNally, Professor of Educational Administration and Supervision, University of Wisconsin-Milwaukee		x		x	
Karl Menninger, Menninger Foundation, Topeka, Kansas				x	
Robert K. Merton, Professor of Sociology, Columbia University	x			x	
William R. Ming, Jr., attorney, Chicago, Illinois					x
Gardner Murphy, Director of Research, Menninger Foundation	x			x	

	S	W	C	Q	I
Theodore M. Newcomb, Professor of Sociology and Psychology, Harvard University	x			x	
A. Harry Passow, Professor of Education, Teachers College, Columbia University=			x	x	
Thomas F. Pettigrew, Associate Professor of Sociology, Harvard University			x	x	
Joseph C. Pray, Professor of Education, University of Oklahoma					x
Ira DeA. Reid, Professor Emeritus, Haverford College, Haverford, Pennsylvania	x			x	
David Riesman, Professor of Sociology, Harvard University			x	x	
Arnold M. Rose, Professor of Sociology, University of Minnesota	x			x	
Milton Rokeach, Professor of Psychology, Michigan State University			x	x	
Norman Royall, Professor of Mathematics, University of Missouri-Kansas City					x
Gerhart Saenger, Professor of Psychology, New York University	x			x	
S. Stansfield Sargent, Clinical Psychologist, Veterans Administration, Phoenix, Ariz.	x			x	
F. L. Schlagle, Superintendent of Schools, Kansas City, Kansas (retired)					x
Charles Scott, attorney, Topeka, Kansas					x
Julius Seeman, Professor of Psychology, George Peabody College			x	x	
Malcolm Sharp, Professor of Law, University of Chicago					x
M. Brewster Smith, Professor of Psychology and Director, Institute of Human Development, University of California-Berkeley	x	x		x	
Hugh W. Speer, Professor of Education, University of Missouri-Kansas City		x			
Lindley Stiles, Professor, Northwestern University; formerly Dean of Education, University of Wisconsin		x		x	
Maurice E. Thomasson, Acting President of Delaware State College at time of trials, now retired		x		x	
Charles Thompson, Professor of School Law, Michigan State University; formerly Dean of Howard University Graduate School					x
William Van Til, Professor of Education, Indiana State University-Terre Haute			x	x	
Wellman J. Warner, Emeritus Professor of Sociology and Anthropology, New York University			x	x	
W. Lloyd Warner, Professor of Social Research, Michigan State University			x	x	

	S	W	C	Q	I
Goodwin Watson, Professor Emeritus of Social Psychology, Teachers College, Columbia			x	x	
Fredric Wertham, Director of LaFarque Clinic; psychiatrist, New York City		x		x	
Charles Evans Whittaker, formerly Associate Justice of the U.S. Supreme Court					x
Paul E. Wilson, Professor of Law, University of Kansas; formerly Assistant Attorney General of Kansas					x
Wilkerson, Associate Professor of Education, Yeshiva University, New York			x	x	

CHAPTER I

THE UNIVERSITY CASES "Whittling Away" at Segregation

Missouri Moves Slowly and Mysteriously

The first of four university segregation cases preceding Brown v. Topeka was Gaines v. Canada (58.) involving the law school at the University of Missouri. The state had met its Negro problem in higher education by setting up segregated Lincoln University in Jefferson City. The law stated that "any necessary school or department could be established there." The Supreme Court of Missouri had decided that a law school was not necessary at Lincoln because Negro students could have their tuition paid to the law schools of any adjacent state.

Lloyd Gaines sought admission to the University Law School at Columbia, Missouri, lost his case in the lower court, but won on appeal to the United States Supreme Court. Chief Justice Hughes handed down the majority opinion of that Court on December 12, 1938. He rejected the contention that the limited demand for admission by Negro students excused "the discrimination in favor of whites.... Gaines' right was considered a personal and present one...As an individual he was entitled to equal protection of the laws..."

Justice McReynolds wrote a dissent in the Gaines case in which he was joined by Justice Butler. He stated that the majority opinion would force Missouri to close her white law school "or break down settled practice concerning separate schools and thereby, as indicated by experience damnify both races." (Emphasis added) (58.)

Lloyd Gaines did not appear for the final hearing and completely dropped from sight, thus giving Missouri time to establish a Negro law school at St. Louis under the administration of Lincoln University. It could hardly have been any better than the Texas law school for Negroes which the Supreme Court ruled naturally "unequal" a decade later.

There was some suspicion but no evidence concerning the mysterious disappearance of Lloyd Gaines, according to William R. Ming, Jr., Chicago lawyer, who was active in the university cases. It was expected that the name of Lloyd Gaines would appear on the draft list for World War II. Mr. Ming made a personal search in the Adjutant General's Office at the beginning of the war and again in 1946. But no Lloyd Gaines. (34.)

Dr. Robert L. Howard, Emeritus Professor of Law at the University of Missouri, was one of the few professors willing to stand up and be counted in favor of Negro admissions during the 1930's.

Apparently Gaines v. Canada was a quiet case in which evidence of concern was shown by very few students or faculty members. As noted below, a new generation of students, including many World War II veterans, were present during the Texas and Oklahoma cases a decade later. They made their influence felt, especially in the McLaurin graduate school case.

At the convention for rewriting the Missouri Constitution in 1945, seven years after the Gaines decision, the old segregation clause was omitted in the first draft. But the question was brought up from the floor and a section was inserted requiring Negroes to attend the separate facilities at Lincoln University unless the legislature specifically allowed those in certain areas to attend at Columbia.

Following the decision for the Negroes in the Texas case, Sweatt v. Painter (63.), the Missouri administration finally saw the handwriting that the Supreme Court had inscribed on the classroom wall. A ruling was requested from the Circuit Court and Judge Sam C. Blair decided that Negroes who could not find duplicate curriculum at Lincoln could be admitted to the University "forever." When a Negro applied at Columbia, the admission officers at the two campuses conferred to determine if the applicant's objectives could be met at the Negro institution. Dr. Francis English, now Dean of Liberal Arts, recalls that approximately thirty to forty Negroes were admitted at Columbia under this arrangement from about 1950 to 1954.

Although the admission of Negroes to the University was achieved without incident, the city of Columbia was still unwilling to pass a fair housing ordinance in 1968. The vote was overwhelmingly negative in two wards. The vote was positive in the other two wards which included more of the University community but, even there, it was not as strong a vote as might have been expected. (28.)

When asked about the appointment of Negro faculty members, one administrator replied that Missouri's record in this regard had been "devilish poor." Several Negroes have been interviewed for positions but the first appointment is a visiting professor in business administration for 1968-69. The first full-time appointment of a Negro faculty member on the Kansas City campus was in 1958, when Dr. Hazel Browne Williams joined the School of Education at the University of Kansas City five years before this institution became part of the Missouri University system. The University of Oklahoma has had a number of Negro faculty members through the years in their several schools and Dr. G. L. Cross, the president for twenty-six years, indicated they would gladly hire more whenever available. (23.)

Missouri had kept segregation in her new constitution and following 1954, her Attorney General, William I. Potter, joined with Eugene Cook, Attorney General of Georgia in seeking overthrow of the Brown decision. (5.) The University had admitted Negroes no faster than the law required and has been slow in finding Negro faculty members.

The Funniest Case - Oklahoma

A young Negro woman by the name of Ada Sipuel was quickly granted "equal protection of the laws" in Oklahoma. Her case, Sipuel v. Oklahoma State Regents, (61.) reached the United States Supreme Court on January 8, 1948. A decision in her favor was rendered unanimously four days later. By a brief order of the Court, the Regents were instructed to admit Miss Sipuel immediately to the University of Oklahoma Law School. However, the Supreme Court did not assure her attendance if an Oklahoma Negro Law School became available. Therefore, in the month following her marriage, Miss Sipuel was again before the Supreme Court as Ada Fisher. This time she lost. The separate but equal rule remained intact. Nevertheless, the Oklahoma regents apparently also were able to read the handwriting on the wall and abandoned a separate Negro law school. Ada Fisher received her law degree at the University and has since entered the doctoral program there.

In McLaurin v. Oklahoma State Regents (57.), a Negro elementary school principal, was finally admitted to the Oklahoma graduate school of education. At various stages he had been required to sit in ante rooms, behind barricades in a corner of the classroom and finally on a back bench designated for Negroes. He was also assigned a separate table in the cafeteria and required to sit alone in the balcony of the library. President Cross of Oklahoma recalls with considerable pride the student reaction to these restrictions: white students joined McLaurin in the library and cafeteria. The two-by-four barricades were torn down and the ropes used in some rooms were cut up for souvenirs. When the case reached the Supreme Court, Chief Justice Vinson in June, 1950, delivered a unanimous opinion in favor of McLaurin, declaring:

"Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange of views with other students and, in general, to learn his profession."

In other words, higher education could hardly be separate and equal. The so-called principle of separate but equal was appearing as a self-contradicting phrase.

Thurgood Marshall recounted some of his "fantastic and unbelievable" experiences while acting as NAACP legal counsel

in an Oklahoma University case. He recalls particularly the first Negro undergraduate:

"That was the funniest case...It was the regents... they had uncontrolled discretion...The legislature said Negroes could be admitted but they had to be in separate classes. The next thing the University knew, they had a Negro boy applying for admission to marching band!"

Faced with the absurd alternative of a one-man Negro marching band, the administration admitted him to the big band. "He marched at all the football games," said Mr. Marshall. "He integrated them."

Using the two-edged sword of satire, Mr. Marshall was effective in helping to thwart the maintaining of a separate Negro law school in Oklahoma. He introduced testimony showing that there were more books in the state penitentiary than in the new law school. He then told the court, "The best way for a Negro to get an education in Oklahoma is to go to the penitentiary." He recalls, "The judge laughed. We had him..." (32.)

Equal Opportunity - Texas Style

The University of Texas case, Sweatt v. Painter (63.), was also settled by the Vinson Court in 1950 at the same time the McLaurin decision was announced. The "separate but equal" principle began to look more and more like an impossibility, at least at the University level. Hemon Marion Sweatt was denied entrance to the University of Texas Law School because a separate school had been established for Negroes. Thurgood Marshall, who plead the case, explained that this separate law school was in "what had been called Prairie View Institute. Most of its degrees were in broommaking, mattress-making, farming, etc. The only thing they did to equalize was to change the name from Prairie View Institute to Prairie View University and add a law school with not one dollar increase in budget." (32.)

The comparison to the University of Texas was too obvious. Because of their own education background, the nine Justices on the United States Supreme Court could easily recognize the handicaps in a separate mushroom law school. For a unanimous Court, Chief Justice Vinson wrote:

"...the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and

influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close."

The Supreme Court had continued to "whittle away" at the long-entrenched practice of maintaining Negro schools that were separate in fact but equal only in fancy. "Judicial restraint" kept them from striking down the Plessy v. Ferguson doctrine. Nevertheless the stage was set for an activist Warren Court and its role with "The Case of the Century," Oliver Brown, et al v. Board of Education of Topeka, Kansas. (48. and 49.)

CHAPTER II

The Topeka Case

Plaintiffs: Oliver Brown, et al. (Negroes)

Defendants: Board of Education of Topeka, Kansas, et al.

Counsel for Plaintiffs: Charles Scott, John Scott, Charles Bledsoe, Robert L. Carter, Jack Greenberg

Counsel for Defendants: Lester M. Goodell, George M. Brewster

Counsel for the State of Kansas: Harold R. Fatzer, Attorney General; Willis H. McQueary and Charles H. Hobart, Assistant Attorneys General

Expert Witnesses in Behalf of Plaintiffs:

Hugh W. Speer	Louisa Holt
James Buchanan	John J. Kane
Horace B. English	Bettie Belk
Wilbur B. Brookover	Ernest Manheim

Judges in District Court: Walter A. Huxman, Arthur J. Mellott, Delmas C. Hill

Note: The Topeka case was the first of the five public school cases heard on appeal in the U.S. Supreme Court. Thus, the name of Brown v. Board of Education of Topeka, became significant to history.

THE TOPEKA STORY
A Finding "The Supreme Court Couldn't Duck"

Why Kansas?

On December 20, 1953, following the second hearing of the Brown v. Topeka cases before the United States Supreme Court, the Topeka Capitol published the following editorial comment:

'Why Kansas?' Asks an Editor

The St. Louis Post-Dispatch is curious as to how Kansas became a party to the school segregation suit now pending in the U. S. Supreme Court. Some pertinent ancient history is raked up in the following editorial comment from the St. Louis paper:

"The five champions of public school segregation before the Supreme Court include South Carolina, Virginia, Delaware, the District of Columbia and Kansas. Why Kansas?

"The first four are Southern in outlook and all practice racial segregation by law. But Kansas does not practice segregation in its state colleges, permits it in high schools only in the Kansas City area bordering Missouri, and allows it in grade schools only in larger towns of the state, where school segregation is usually based on neighborhood lines.

"Beyond that, however, Kansas was founded as a state on the belief in equal rights. Before the Civil War, the slavery question was fought out in 'Bloody Kansas.' No state better symbolized the conviction of the North. Why is Kansas now defending segregation?

"When the public school case was first argued before the Supreme Court last year, a Kansas official admitted that ending segregation would not disturb his state much. He merely argued that Kansas would abide by the old theory that education might be 'separate but equal.'

"The shades of Governor Robinson and Jim Lane and the other Jayhawkers of a century ago would revolt at this theory. It was not what they fought for, and it is questionable whether today's Kansans stand for segregation. Or have their officials asked them?"

"Bleeding Kansas" shocked the nation during the 1850's with a conflict between pro and anti-slavery forces that amounted to a preview of the Civil War. The famous raids by John Brown and Quantrill are part of the story. The result of the turmoil was the territory's admission to the Union as a free state in 1861, with Congress finally accepting the constitution adopted by abolitionist settlers.

"Why Kansas?" is still a question asked when Brown v. Topeka is discussed. Why should the title of "the Case of the Century", striking down school segregation, bear the name of the capital city of Kansas, the last state to be admitted to the union before the Civil War--a state with Northern, Abolitionist and Free State approval finally stamped upon it? As cited in Chapter Seven, Thurgood Marshall points out that the choice of the five states in the school segregation case was largely accidental. However, Kansas was among those states where such litigation was justified, as surprising as it may seem.

Historically Kansas is a Puritan state. Through immigration and rather direct ideological pipelines from New England, the Puritan mind became a significant characteristic. There are many variations and paradoxes in three hundred years of the Puritan tradition in this country and it has been crossed by many other cultural influences. However, in the middle of the twentieth century there are still traces of Puritan orthodoxy, sternness discipline, temperance, industry and intolerance. The Puritan was not an environmentalist. He was an hereditarian, and modern adaptations of the doctrines of "election" and "predestination" were a help in rationalizing social stratification. Having become middle class and a modest capitalist, at least, by several generations of hard work, frugality and self-discipline, he was likely to assume that anyone could do the same if he tried. Generally, to be poor was to be lazy and "no good". Puritan fathers and mothers were especially anxious to protect the purity of the "blood" and would not look favorably upon their children mixing too freely with families not of the fold. In New England even admission to church membership was not easy. In other words, there was considerable religious support for maintaining class distinctions which could easily include racial difference.

But through the years there have been many paradoxes in the Puritan ideology and conflict in the individual mind. After all, Puritanism in the colonial period was largely responsible for rebellion against the English crown and the establishment of democratic institutions. Brotherhood of man and universal education were strongly endorsed. Although most twentieth century Kansans had been relatively kind to the Negro, he was still something of a second class citizen who was not generally accepted

in public accommodations. He was all right in his place. In some cities, school segregation still had the sanction of law and in others the sanction of custom. As many other people, the Kansas Puritan could partially resolve this conflict by verbalizing the principles of equality in church and in political platforms while he tolerated a lag in social and legislative action toward such ends. The rise of the lower class, if possible at all, was considered a boot strap operation.

One of the conspicuous land marks of early Kansas history is Shawnee Mission, the Methodist Indian school established in 1839 near Kansas City. Rev. Thomas Johnson headed the school for twenty-six years. His name was given to the county, which borders Missouri near Westport Landing. The three large red brick buildings still stand as a museum. This early religious and educational outpost was amazingly effective in many ways. The curriculum was very comprehensive, ranging from the trades and agriculture to the classics. Rev. Johnson, however, had other interests too. He became wealthy as a slave trader. He explained to his church and government supporters in the East that they needed Negro slaves for the extensive shops and farms so that they could better civilize and Christianize the Indians!

An all-time bestselling book, In His Steps, authored in 1896, by Rev. Charles M. Sheldon, was written expressly to point out the gap between the verbalizing of Christian tenets and actually trying to live them out. The book explores the difficulties and rewards of attempting to lead contemporary life as Jesus would have done it. The story is launched by the startling appearance of a dusty, worn, shabby-looking man in the midst of the Sunday worship service of a prosperous Protestant church. In previous encounters with this man, the people of the town had virtually turned their backs on his condition. He causes the church-goers to confront the inconsistency of their words and their deeds, their ability to profess Christian virtues and yet not raise a hand to help the unfortunate. It may seem significant that the author, Rev. Sheldon, was a Protestant minister in Topeka, Kansas. His book may be read as an important social document on that community as well as many others. Kansas, despite its background in the Puritan ethic, or perhaps because of it, maintained a set of beliefs that did not intrude upon its social conscience.

The same Rev. Sheldon, at one point during his career in Topeka, took under his wing a Negro youth and helped him through school. The Negro was Elisha Scott, who succeeded in becoming a lawyer and a champion of civil rights in Kansas.

He plead cases from the 1920's when the Ku Klux Klan flourished in Kansas. After finishing Washburn Law School, his two sons, John and Charles, became his partners. The Scott family law firm was engaged in 1951 to bring to court the suit of Brown v. Board of Education of Topeka.¹

Elisha Scott won a major victory in 1949, two years before the Topeka case, in South Park, a lower-class community in Johnson County, Kansas, on the edge of suburban Kansas City. The local school district was requiring the small group of Negro children to attend a crude, frame school building which even lacked indoor plumbing. The two teachers for the school were uncertified. The deplorable conditions at the school aroused the indignation of a neighbor citizen, Mrs. Esther Brown, who undertook the cause of the Negro children. She ran head on into a hostile Board of Education whose president described her as one of those "trying to get the niggers into the white school." The crusade provoked anger in the white community. Both Mr. and Mrs. Brown and the Negroes were subjected to harrassment and threats---from house burning to tar and feathers. (20.)

Despite difficulties and discouragement, Mrs. Brown succeeded in getting the South Park case to court where it was won by Elisha Scott.²

Following the South Park case, Mrs. Brown explored the possibilities of court action in Wichita. But Topeka appeared to be a more opportune spot. There she worked with the local NAACP, lending moral support, raising funds and enlisting outside help. She readily admits to being called "the white Brown" of the case. In a sense, the title stands as a tribute to the support and encouragement she has given the cause of desegregation.

I happened to have been asked to give the talk in South Park at the first commencement when Negro parents were present. As I approached the building, I was puzzled to note that it was

¹Elisha Scott's law office was the focus for civil rights legal efforts for some years. The late Loren Miller, author of The Petitioners, referred to in Chapter Seven, spent some time there prior to moving to Los Angeles where he became a champion of fair housing.

²The District Court decision on the South Park issue read in part: "This court regards the present action of the school board as arbitrary and unreasonable and an attempt by subterfuge to bring about segregation which the statutes and laws of this state do not permit."

well-surrounded by highway patrol and police cars. There was no incident but the atmosphere was very tense. The Superintendent anxiously asked me in a whisper if there would be anything in my speech about integration or race relations. I had not intended that there would be and therefore was not placed in a sudden, free-speech conflict in my own mind. Anyway, to speak on this subject then and there would probably have been like "shouting 'fire' in a crowded theater."

The small number of South Park students who wished to attend high school were sent to Sumner, the Negro high school in Kansas City, Kansas, across the county line. Their home district, Shawnee Mission, took advantage of the Barnes law¹ and provided free bussing and textbooks as an inducement to stay out of the all-white Shawnee Mission High School.

The principal of Shawnee Mission High School recalls that in August, 1951, soon after the Topeka trial, he looked out his office window one morning and saw a group of Negro parents and students flanked by a "half-dozen lawyers from Kansas City, Missouri," approaching the building. Anticipating their desire to enroll, he quickly asked the Superintendent what he should do and was told there was only one thing to do under the law--admit them. The principal reported that the small group of Negroes was rather quickly accepted by the white students because of their ability to entertain; one would play boogy-woogy on the piano and one was a master at jig-dancing.

Following the enrollment of the Negro students in Shawnee Mission and prior to the Supreme Court decision of 1954, several members of the Shawnee Mission Board of Education considered building a segregated Negro high school. Special legislation would have been necessary to allow this large and rapidly growing high school district to be segregated. The largest first class city, Kansas City, Kansas, already had such a statute.²

Representatives of the board went to Topeka in the interests of such a bill and sought the help of Alvin S. McCoy, then the Kansas political correspondent for the Kansas City Star. (Note: Mr. McCoy has been Science Editor of the Star since 1963.)

Mr. McCoy recalls telling the board members that it was utterly folly even to contemplate such a move, especially with the segregation decision pending. He advised the board members that he would give any such efforts full news coverage in the Star.

¹This law enabled Sumner High School to collect tuition from a county fund when admitting non-resident students.

²This statute was enacted following several incidents about 1908 which culminated in a Negro high school student shooting and killing a white football player during a Wyandotte High School home game.

Mr. McCoy does not know whether or not this prospect of publicity was what dissuaded them, but the move was dropped. Had the board members persisted, Mr. McCoy might have earned a second Pulitzer Prize.¹

Kansas law permitted segregation of elementary schools in the fifteen first-class cities (those over 10,000 population).

But the law also stated that there could be no "discrimination" at the high school level. At the Topeka trial, the plaintiff lawyers understandably seized on the inadvertant use of the word "discrimination" in the Kansas law as an admission of the true meaning of segregation.

In accordance with this legislation, the Topeka Junior and Senior High Schools were integrated while the six-year elementary schools remained segregated. This necessitated the bussing of most Negro children from their own neighborhoods to distant schools in order to attend classes with their own race. Many of these Negro children lived within sight or easy walking distance of white schools.

The Topeka chapter of the NAACP had begun to take up the question of integration in 1948. Mr. McKinley Burnett, president of the chapter for sixteen years, arranged a number of conferences with the Board of Education. Aware of some inequalities between the white and Negro schools, the Board tried to make some adjustments.

Although meetings of the Topeka NAACP were generally not attended by more than a dozen members, this small organization had focused its long-range goals on complete integration. Mr. Burnett and four other members of the original NAACP group pointed out that even in the integrated high schools there existed an inner segregation which restricted Negro students from participating in such activities as the band and music festivals. The schools insisted upon complete segregation as far as social activities were concerned. For example, while white pupils had the usual school organizations, the Negro pupils had a Bocker T. Washington Club, a Phyllis Wheatly Club and a Dunbar Club. As labeled, these were segregated organizations. Mr. Burnett summarized: "...Up there at the high school while they called it integrated, it was integrated only from the outside. When you got on the inside, it was just as Jim Crow as Alabama." All four members of the original chapter of the NAACP in Topeka who were interviewed felt that the Board of Education generally turned a deaf ear to Negro complaints and reacted as if it was all part of a "normal" situation. (21.)

¹In 1954, Mr. McCoy won the Pulitzer Prize for exposing insurance irregularities involving a number of state officials.

After several conferences and much deliberation, the chapter decided by 1950 that the case of complete segregation should be taken to court. The main problem was money. They wrote to the national chapter for approval of such a move and at the same time requested funds to underwrite the expense. They received a favorable answer. Although complete financial support could not be promised, assistance from the NAACP legal department was assured.

Indifference or Fear?

The negative attitude of the Negro community in the early 1950's toward active integration movements has been the cause of some speculation. Mr. William R. Ming, jr., prominent Chicago lawyer who has been active in civil rights cases, recalls that when he plead an integration case in Alton, Illinois, twelve hundred Negroes signed a petition favoring segregation. He explained that in the early 1950's, Negroes still did not feel free to stand up for equal rights. They had been taught to stay in their "place." They still took pride in knowing their "place" and generally felt that they were violating their self-respect by challenging white supremacy. (34.)

When we asked the leaders of the NAACP about the seeming indifference of the local Negroes, the answer was, "We could never figure it out." One member of the group interviewed, Mr. Leon King, believed that there was real pressure put on Negroes because of the association with the case. He was one who felt he had been dismissed from a job because of his connections. The group attached considerable significance to the position of a Negro member of the school administration who was commonly referred to by both Negroes and whites as an "Uncle Tom." He was blamed for intimidation and passing the word that Negro teachers would probably lose their positions if the schools were integrated. (21.)

Charles Scott commented on this report by saying, "...they (teachers) were somewhat apprehensive about what was going to happen to their jobs."

Others felt that they did not want to be involved because the organization represented a minority of the Negro community. Teachers and other Negroes "were just plain scared." Some did not trust the NAACP leadership. (36.)

As Mr. Burnett put it, "They were afraid of that (retaliation and loss of jobs) and then just fear because of fear, I guess." (21.)

Considerable credence can be given to this fear although the official attitude was not revealed until two years later, when the case was still pending before the Supreme Court. On March 13, 1953,

in accordance with Board of Education action, the letter reprinted on the following page was sent to all Negro teachers who were not yet on continuing contract.

This letter was framed and hanging in the Burnett living room.

When asked about the letter in a recent interview, Dr. Wendell Godwin the former superintendent who signed it, felt that at the time it seemed a necessary statement on how matters stood for Negro teachers. (25.) Attorney Jacob A. Dickinson, who was president of the new school board which took office immediately after the Topeka trial (1951), explained in an interview the steps adopted in September, 1953, by the Board to terminate segregation in the Topeka schools before the case opened for reargument in the Supreme Court. (24.) However, he made no mention of the letter (approved by the same Board) to the Negro teachers in March of 1953, only six months before the voluntary desegregation plan was adopted. The minutes of the Board of Education meeting of September 8, 1953, show the following four points considered in terminating segregation in Topeka:

- 1) That the termination of segregation should be done in a gradual and orderly manner.
- 2) That in (the superintendant's) judgment it is a social impossibility to terminate segregation suddenly.
- 3) That speed with which segregation is terminated depends largely on the forbearance and self-discipline of both the white and colored people.
- 4) That it is not possible to set an accurate time in which segregation is terminated completely.

Apparently, cool and cautious were the keynotes for both faculty and student integration. Perhaps the theme of Dr. Sheldon's book referred to earlier, was still relevant to the attitude of the white power structure in Topeka in 1953.

A letter from Walter White, National President of the NAACP, had gone to Mr. Burnett encouraging the Topeka group to press the Board of Education for desegregation. One active member of the Topeka chapter, Dr. Edward S. Foust, is now president of the Omaha Area Council of Churches. On December 2, 1966, he wrote the letter, reprinted below, to Mrs. Wilna Johnson of our research staff. In it, he recalls Mr. White's letter and gives his views on the temper of Topeka prior to the trial.

THE PUBLIC SCHOOLS OF TOPEKA
Topeka, Kansas

Wendell Godwin
Superintendent

March 13, 1953

Miss Darla Buchanan
623 Western Avenue
Topeka, Kansas

Dear Miss Buchanan:

Due to the present uncertainty about enrollment next year in schools for negro children, it is not possible at this time to offer you employment for next year. If the Supreme Court should rule that segregation in the elementary grades is unconstitutional, our Board will proceed on the assumption that the majority of people in Topeka will not want to employ negro teachers next year for white children. It is necessary for me to notify you now that your services will not be needed for next year. This is in compliance with the continuing contract law.

If it turns out that segregation is not terminated, there will be nothing to prevent us from negotiating a contract with you at some later date this spring. You will understand that I am sending letters of this kind to only those teachers of the negro schools who have been employed during the last year or two. It is presumed that, even though segregation should be declared unconstitutional, we would have need for some schools for negro children and we would retain our negro teachers to teach them.

I think I understand that all of you must be under considerable strain, and I sympathize with the uncertainties and inconveniences which you must experience during this period of adjustment. I believe that whatever happens will ultimately turn out to be best for everybody concerned.

Sincerely yours,

/s/ Wendell Godwin

WG/la

Wendell Godwin
Superintendent of Schools

cc: Mr. Whitson
Dr. Theilmann
Mr Caldwell

Mrs. Wilna A. Johnson
2600 Bellefontaine Street
Kansas City, Missouri

Dear Mrs. Johnson:

In your letter of November 27th, you asked about the Brown vs. Board of Education case involving school desegregation. I trust that you are well.

The mother of the child involved, still lives in Topeka. I would suggest that you that you contact her also.

In keeping with your questions, I am answering accordingly.

1. Yes, I do recall a letter from the late Walter White.
2. It did have a direct bearing on the morale of the NAACP and the community as a whole.
3. The zealots were to be found among the masses, inspired by ministers and other civic leaders. This is where the push and drive came from.

The middle class and especially Negro teachers were somewhat complacent, due to intimidation and fear of the purse-strings.

However, for the most part, the community was together.

4. Mrs. Esther Brown of Kansas City, was very helpful to our purposes. A white woman's presence and interest in our struggle won support and opened some doors for us.
5. The total picture of segregation and inequalities were in our minds when attacked the problem. We chose this case as an example to arouse a public consciousness, and because we had a good chance of winning.
5. This case virtually killed a young man named Daniel Sawyer, who became so emotionally involved (as the ramrod) that he lost his health completely. His daughter Constance, is a school teacher now in Topeka. Dan died and his young wife soon followed, leaving about 7 little children. They refused to be separated. Hence, they stayed together, with the help of neighbors and the community.

12/2/66

/s/ E.S. Foust

A Final Request

Mr. McKinley Burnett recalled in our interview the climactic meeting between the Board of Education and the NAACP leaders:

"We made this (recommendation for desegregation) in the nature of a request in 1948 and again two years later...I believe it was about the last important meeting before school started (in the fall of 1950) when I said at a Board meeting, 'It may sound rather abrupt but you've had two years now to prepare for this.' As soon as I sat down, one of the Board members jumped up and roared, 'Is that a request or is that an ultimatum?' He roared so loud and so quick that it rather frightened me. I couldn't get myself together. He became so very angry. I don't know, he got up and pulled off his coat and hung it up, and I didn't know if he was getting ready to fight or not. He said, 'This is the most democratic Board in the State of Kansas,' and we've done this and we've done that. 'What's the cause you've been running up here for?' So of course, we did go to court. It was an ultimatum, but I didn't realize it at the time...This was our last request (to the Topeka Board of Education). We knew what they were going to do. We knew they were going to say 'No', and then we were going right from there to court. So that's the way we led them along and we went to court the following spring. And they weren't ready... They didn't think we'd be able to go to court.

"At one point we called a meeting of the team. First, we had a man from the National Office (NAACP), a lawyer, who was going to speak to us...We invited the teachers to come. They didn't come, not a one."

In fact, Mr. Burnett stated that the Negro PTA sent a letter to the Board of Education expressing their official support of the Board position. Public school teachers hesitated even to comment on the case as it was being prepared for court. (21.)

The Topeka NAACP had made its final request to the Board for relief from the inconvenience, injustice and humiliation imposed upon Negro school children by segregation. That request had been denied. The forthcoming suit, Brown v. Board of Education of Topeka, was brought to court by a small minority of Topeka Negroes who overcame intimidation and fear in order to have their case heard. They had encouragement and backing from a few white citizens, chiefly Mrs. Esther Brown. They had somewhat belatedly received the blessing of the national NAACP.

Preparing for the Trial

My first involvement with the Topeka case was at the request of Mr. Sydney Lawrence, Director of the Jewish Community Relations Bureau of Kansas City. He had been in touch with our University president, Dr. Clarence Decker. The University permitted the faculty occasional outside activities. I did not feel obligated to request the president's approval, but as a courtesy, I sent Dr. Decker a note stating that I was planning to participate and asked for any advice or suggestions he might have. His reply was, "Do justly, love mercy and walk humbly with thy God." Although this obviously sent me to Topeka with his "blessing", the humor of it was not lost on me or my associates. Actually, his approval was consistent with the fact that integration at the University of Kansas City had been endorsed by the Board of Trustees in 1948 on the recommendation of the president and a near unanimous vote of the faculty.

Sydney Lawrence had been in touch with Robert Carter and Jack Greenberg of the NAACP Legal Staff who were to help the Scotts plead the cases in Topeka. Mr. Carter called me long distance to ask if I would do three things: 1) Direct a survey of the Topeka school system to determine the extent of any inequalities; 2) Help secure expert witnesses; and 3) Give testimony myself dealing with the results of the survey and the general educational consequences of segregation.

There was already a busy summer in prospect. Enrollments were high at the University due to many returning G.I.'s doing graduate work and the usual influx of teachers for the summer session. Besides my duties as Chairman of the Education Department, I had planned to direct the second of the Human Relations Summer Workshops (these were held annually through 1965, enrolling a total of approximately 1,000 teachers and other interested people). This workshop, however, and my participation in the Topeka trial turned out to be mutually reinforcing activities.

Involvement in the case was a natural learning experience for the participants. A mock trial put on prior to the Topeka hearing created a sophisticated level of readiness for the University workshop students, who went to Topeka en masse. I naturally felt real moral support from the seventy-five members of this group sitting in the Federal Court Room during nearly two hours of testimony, half of which was under heavy fire of cross examination.

As we got into the Topeka situation, it became more and more obvious that desegregation was not a popular cause in Kansas in 1951. One of the first points Sydney Lawrence felt obliged to

make to me was that he thought participation would not hurt me professionally. One of the first points made to me in Topeka by two school administrators who wished to dissuade me was that it would hurt me professionally. One advised me: "Look around the mountain on it first, Hugh." Another told me that the NAACP group in Topeka was not the kind of people I wanted to get mixed up with. He also said that the Board of Education had a very skillful and "mean" lawyer. The same administrator was leaving Topeka to take a position in a large city where he had bought a new suburban home. He was pleased to find a large new church nearby which was so popular that it had two services every Sunday morning and "there was not a nigger or a Jew within ten miles."

I was given the name of a leading white citizen of Topeka to call in an effort to enlist his aid and advice. I got only advice: The thing for the Negro to do was to keep clean and make himself respectable and everything would work out all right for him.

Mrs. Esther Brown told me later that, in the beginning, the Topeka Negro community did not trust me, but that they soon became convinced that the whole effort was sincere. Except for the public school administration, members of the white community seemed hardly aware of our presence. Nevertheless, we frequently referred to ourselves and each other as "carpet-baggers." We got something of that feeling. As implied by the defense attorney a couple of times, those of us from Missouri also felt we were regarded somewhat as "bushwhackers." These terms are a hundred years old, but so is the issue of Negro civil rights.

During the preliminary survey, I spent an evening visiting in the home of an elderly Negro couple by the name of Wright who were highly respected in Topeka. He had served a term as County Treasurer and stayed in the office as deputy treasurer for a number of years. They explained much of the history of the problem there. Mrs. Wright said that years earlier she had sent her own son through a white school and had had to warn him in advance that he would be called terrible names, but that he must endure such insults for the good of his own future and the cause of human rights. That evening gave me considerable encouragement and confidence for participating in the case.

At the end of the first day of the trial, all the participants were invited to the Wright home for a delicious chicken dinner.

On the last day of the trial, at the close of the proceedings, Mrs. Wright came up to me in the back of the Federal Courtroom to express her thanks for my participation in the case. I never have received a statement of thanks that I appreciated more.

The three Negro lawyers of Topeka, Mr. Bledsoe and the Scott brothers, were to work with Robert Carter and Jack Greenberg from the NAACP legal staff. They were all highly competent, friendly and went all out for the case. We worked closely together throughout the trial.

The Board of Education was to be represented by their attorney, the late Lester M. Goodell, assisted by George M. Brewster. Harold Fatzer, the Attorney General of Kansas, was represented by Willis H. McQuery and Charles H. Hobart. The judges were: Walter A. Huxman, ex-Governor of Kansas, Arthur J. Mellott, and Delmas C. Hill, sitting as a three-judge U.S. District Court under Chapter 155, title 28 U.S.C.

Securing Witnesses

Securing expert witnesses was difficult. Charles Scott had tried unsuccessfully in Iowa and Nebraska. The Dean of our Law School showed no interest in being involved. I called the Dean of Education at the University of Nebraska and was told that they were at that very moment in a meeting trying to figure out how to staff their summer session and could not spare any time. I wrote a letter to the Menninger Clinic; I received no direct reply; however, Louisa Holt, an associate of the Menninger staff was secured as a witness and a considerable money contribution was made later by Dr. Karl Menninger. Dr. James Buchanan, professor of school administration and chairman of the Graduate Division at Kansas State Teachers College of Emporia, came to testify over the direct protest of his president who felt that participation was poor politics and bad public relations for a state school. Through the good offices of the late Dr. George Kelly of Ohio State University, we secured his colleague Dr. Horace B. English, authority in child psychology. From the University of Kansas City (now the University of Missouri at Kansas City) was Miss Bettie Belk, research associate of the University of Chicago, on our summer workshop staff, and Dr. Ernest Manheim, Chairman of the Sociology Department.

Dr. John Tierney, Professor of Counseling at the University of Kansas, agreed to testify, but the court put a limit on numbers before his turn came. Mr. Carter, attorney for the plaintiffs, was able to secure Dr. Wilbur Brookover, Professor of Educational Sociology at Michigan State University, and also Father John J. Kane of Notre Dame.

This group then, made up the team: eight college professors, none of whom had been in Federal Court before; five young lawyers, a small group of Negroes from Topeka, and two active citizens

from Kansas City. Charles Scott reported that Mr. Goodell, the Board of Education attorney, had also tried to secure some expert social science witnesses but produced none.

Selecting Plaintiffs

Oliver Brown had been selected as the chief plaintiff not only because his daughter was one who had to pass the near-by white school on her way to a Negro school twenty-one blocks away, but because as a welder for the Santa Fe Railroad and as a minister he was not likely to suffer retaliation by the loss of his job.

The School Survey

Dr. Buchanan and I undertook a survey of the more critical features of the Topeka school system that might affect the quality of educational opportunity. He concentrated on buildings, I concentrated on budget, teacher preparation, teacher load, curriculum and library.

The superintendent told me that they had nothing to hide. Mostly I was able to secure the information I needed, but encountered some difficulty when I asked for the building insurance figures. I decided that the simplest and surest way to make a comparison of building values was to take the Board of Education's own insurance valuations, compute their valuation per classroom and thus compare Negro and white schools. First I was told to come back later. Then I was given a wrong set of figures. Finally I was given a correct set.

NAACP Finances

Money was a problem. As Thurgood Marshall described the situation: "...one man has never been convinced that I didn't have a big slush fund tucked away some place. I have never convinced him. He always says, 'Okay, Okay, let's put it this way. Nobody's found it yet.' I said, 'Yeah, including me.' That's what he said, 'nobody'. I haven't found it either, but they thought we had unlimited money...We were broke in those days." (32.)

It was reported at one time that the entire Topeka trial, including the cost of transcripts, amounted to about \$2,000. This was a great deal of money to be raised by the NAACP and their friends at that time. Yet by modern comparisons it had been one of the least costly cases on record. Only one hundred dollars was raised in Topeka prior to the trial. Fifteen hundred dollars came in later, largely through the efforts of Dr. Karl Menninger and Harry Woodring, ex-Governor and Secretary of War. Witnesses who came for only a day received only expenses. Those who spent long periods received modest remuneration for part of their time.

Unequal Facilities or Segregation Per Se?

Thurgood Marshall said in our interview on April 3, 1967, "There was no master plan, no master strategy." (In the beginning), "We were not figuring on the Supreme Court so much. We were just figuring where it would make as much headway as possible in the other direction, that is, by the separate but equal principle. The legal section was the first to take up segregation per se and the NAACP National Convention followed...We really started out for separate relief but it shifted in mid-air (to the segregation per se argument)...we all shifted about the same time... We've since been trying to determine among ourselves as to just when we did. We're not sure. We have no record." (32.)

The shift was not yet definite by the time of the Topeka case. The trial was to open on Monday morning June 25, 1951. The preceding Sunday afternoon there was a long planning session which included the three Topeka lawyers for the plaintiffs along with Mr. Carter and Mr. Greenberg, Esther Brown, Dr. Manheim and myself. One or two other witnesses were present part of the time. The main discussion was on whether to emphasize unequal facilities, segregation per se, or both. Basing the whole case on segregation per se was considered. It was not so much an argument between individuals as it was an open-minded discussion by the group. However, I do recall later that in jest Mr. Carter told me that he knew I was from Missouri because I was so stubborn.

It was agreed that we should tell the Topeka story as we saw it, truthfully and completely. This meant that there would be some evidence upon the inequality of facilities, although we would readily admit wherein we had found them equal. The greatest emphasis would be placed on segregation per se.

There was some thought that this total approach might be the best strategy, too. Knowing that the Board of Education lawyer was probably best prepared to defend the quality of the facilities, this approach could be expected to divert his fire from what we considered the main issue, segregation per se.

The judges had held a pre-trial conference with the lawyers on the preceding Friday at which time a number of agreements as to witnesses, timing, and exhibits had been reached. A few matters were left over for final determination at the beginning of the trial on Monday morning. They mostly concerned minor points of definition regarding auditoriums, playrooms, and gymnasiums.

But we met one rebuff early in these preliminary proceedings. Using the Board of Education insurance evaluations, I had prepared a map showing the 20 elementary school buildings in Topeka

and indicating the insured value per classroom of each.. The map also showed clearly the location of buildings in relation to the homes of the plaintiffs. The request to have it entered as an exhibit led to the following exchange:

MR. JOHN SCOTT: (for the Negro plaintiffs) ...We would like to enter this as a stipulation in this particular case.

MR. GOODELL: (for the Board of Education) I couldn't agree to that without knowing something about it. Who prepared it?

MR. JOHN SCOTT: Dr. Speer.

MR. GOODELL: I wouldn't agree to such a thing as that. It's some school teacher from Kansas City that gave an expert opinion about...

MR. JOHN SCOTT: It's no such thing.

JUDGE HUXMAN: Just a minute. You address your remarks to the court please. If you can't agree to it, why we can offer it in the due course of time and we will then rule on it at that time. (46, p.9)

Then Judge Huxman apparently felt it was an appropriate time to give the following admonition:

"Judge Mellott makes this suggestion. I agree with him. It will be the endeavor of the court to decide the case according to the law and the evidence. We realize that, of course, there is considerable sentiment in this case that you can't get away from. We trust that, first, there will be no quarreling or bickering among counsel; it's not called for, it's not necessary and it doesn't add anything to the value of the case. We trust that counsel will keep that in mind. Also there will be no demonstration on the part of the audience or spectators in any way. This, of course, is a public trial. We want all those who are interested to be here, but decorum that is maintained in Federal Court must be maintained throughout the trial." (46, p. 10-11)

Reminding the audience that there could be no demonstration was probably unnecessary, even for our workshopers, who felt a deep involvement in the issue. They were a mature group, mostly teachers. In his interview with us in the fall of 1966, Judge Huxman said he was conscious of no disorder at all. (29.)

The courtroom was not more than half-filled. The seventy-five workshop members probably made up the majority of the audience. Topeka was still playing it cool.

The Topeka hearing ran for a day and a half. The transcript of record covers 281 pages, approximately 55,000 words.

Outline of Case

The amount of time spent on an argument is not necessarily indicative of its relative importance in the final analysis. However, the time given to each type of testimony does provide some perspective on the trial. Therefore the following table is provided:

Preliminary arguments with counsel and judges	12 pages
Testimony of Arthur H. Saville, member of the Board of Education	6 pages
Testimony of Dr. Kenneth McFarland, Superintendent of Schools	20 pages
Other school personnel and bus drivers	34 pages
Total testimony of Negro plaintiffs	46 pages
Total testimony of expert witnesses	
Broken down as follows in the order of appearance:	126 pages

	<u>Testimony</u>	<u>Gross Examination</u>	<u>Total Pages</u>
Dr. Hugh Speer	26	25	51
Dr. James H. Buchanan	12	3	15
Dr. Horace B. English	10	5	15
Dr. Wilbur Brookover	5	4	9
Dr. Louisa Holt (Howe)	7	4	11
Fr. John J. Kane	6	2	8
Miss Bettie Belk (Sarchet)	4	8	12
Dr. Ernest Manheim	4	2	6
Closing arguments for the plaintiffs			29
Closing arguments for the defense			8

The attorneys for the Boards of Education in three Kansas first-class cities were admitted as amicus curiae. They were all on the side of the defense. They had come from Coffeyville, Manhattan, and Leavenworth.¹

The examining of the first witness, Mr. Saville, a member of the Board of Education, netted little information of significance in the case. (46, p. 9) Similarly, the early questioning of Superintendent McFarland (46, p. 18) was limited to the choice of the four Negro schools by parents, the length of the school days and bus schedules. At one point Judge Huxman reprimanded Mr. Carter for going on a "fishing expedition" in an effort to discover some evidence of discrimination.

The Plaintiffs Testify

The first plaintiff, Mrs. Lena May Carper and her fifth grade daughter, Katherine, testified that the child had to walk several blocks across a busy street to the bus stop where she often waited in the cold (46,p.33). She had to go to another room for fifteen minutes while the teacher drove a school bus during the lunch hour.

On the witness stand the child was treated kindly and responded readily. There were several objections but no cross examination.

Oliver Brown testified next that his eight-year-old daughter was away from home from approximately 8:00 a.m. to nearly 5:00 p.m., that the child had no opportunity to come home for lunch and that the school had no provision for a hot lunch. Furthermore, his daughter was obliged to walk six blocks to the bus pick-up point, crossing busy Kansas Avenue and the railroad switch yard. She often arrived at the school building 30 minutes ahead of time and had to wait out in the cold, "clapping her hands, humping up and down to keep warm." Had she been permitted to attend the white school in her neighborhood she would have had only seven blocks to go. (46, p. 42) A neighbor, Mrs. Watson, verified the testimony of Oliver Brown.

¹In directives to counsel toward the end of the trial, Judge Huxman gave his personal opinion about the value of amicus curiae: "Frankly, I have never been very much impressed with this amicus curiae theory of the law. There just isn't any such thing anyhow because an amicus curiae has an active interest on one side or the other of the litigation...if you could get all the parties who have entered an appearance amicus curiae to join with you in the brief it would save a lot of duplication." (46, p. 280-281)

Mr. Goodell objected to the testimony on the grounds that it is pure accident when families happen to live close to school houses: "We can't have school houses next door to everybody." The objection was overruled by Judge Huxman. (46, p.50)

The other plaintiffs testified in a similar way as to the dangers, inconvenience, long waits, safety and health hazards and wasted time caused by the children having to travel long distances to a Negro school. One mother testified that her child went right by two white schools on his way to the Negro school.

After the second such witness, Judge Huxman said, "...Speaking for myself alone...I will take judicial knowledge of the fact that where there are only four colored schools in a town of this size, against eighteen white schools, that there are innumerable instances of this kind where colored children will go by a white school and go much further to a colored school than they would be required to go if they had the privilege of attending the white school. That is what you are trying to establish, isn't it?" (46, p.34) Mr. Bledsoe replied for the plaintiffs, "That is, if the court pleases." But several other witnesses were allowed to testify in similar vein, often over the objections of Mr. Goodell, who repeatedly pointed out that some white students had to go a long way to school also, particularly those who lived outside the city but attended the Topeka schools. (46, p.51)

Mr. Goodell also objected to testimony regarding the dangers of traffic conditions at busy stops, saying: "There is no evidence that the Board of Education has any control over safety devices, the installation or operation of them." He was overruled.

James Richardson testified in a somewhat different vein. He lived only two blocks from the white school, but eleven blocks from the Negro school. He had enrolled his child in a parochial school because he did not believe in segregation. Again Mr. Goodell objected but he was overruled. (46, p.65)

A Point of Dignity and "Light"

Silas Fleming testified that his children rode the city bus and he paid the fare because this meant they had to walk only one block on each end of the line. They would have had to walk about six blocks to the school bus stop, passing two white schools enroute, one of them only two blocks from home. Mr. Fleming then said, "I would ask this court for a few minutes to explain why I got into this suit-- whole soul and body."

Mr. Goodell objected to "the voluntary statement," but Mr. Fleming was permitted to speak: "Well, it wasn't for the sake of hot dogs; it wasn't to cast my insinuations that our teachers are not capable of teaching our children, because they are supreme and extremely intelligent and are capable of teaching my children or any black kids, but my point was that my children and I are craving light, the entire colored race is craving light, and the only way to reach the light is to start our children together in their infancy so that they come up together." (46,p.76). Judge Huxman responded, "All right, now you have answered and given us your reason."

The witness: That was my reason.

MR. JOHN SCOTT: Thank you.

An understanding judge kept the court open for the whole truth. A humble, thoughtful man, Silas Fleming, in his own way, anticipated the emphasis that was to emerge in the Topeka decision and out of volumes of briefs and testimony was to become the decisive point before the Supreme Court.

Separate, Equal and Unequal

When Robert Carter called me long distance to ask if I would participate in the case, I told him I would have to call the plays as I saw them, according to my best professional judgment. He readily agreed and said I would be free to testify as I saw fit. At no time was I ever asked to do anything but what I considered an honest professional job.

There was neither time nor resources for an exhaustive school survey. Therefore, we concentrated on what might be considered the critical points and took such short cuts as validity would allow. As already mentioned, we compared the relative quality of the Negro and white school buildings simply by using the Board of Education's own insurance figures and we came up with an insured value per classroom as cited in the testimony below. (46., p.84) We found no significant difference in the preparation of the faculties, pupil-teacher ratios, the salary schedule, the budget generally, or in the courses of study. We said so. All of the Negro teachers and all but 15% of the white teachers had Bachelor degrees. Twelve per cent of the colored teachers and 15% of the white teachers had Master's degrees. (46., p.82)

To make a comparison of library materials in the two groups of schools, I asked a half dozen experienced elementary school teachers enrolled in our Human Relations Workshop to go to Topeka

and sample the books as to numbers, dates, appropriateness, and condition. They systematically collected data on the quantity and quality of the books in the white schools and in the Negro schools. (46,p.93)

In brief, the case for the Negroes came to focus on four main points: first, the hazards and inconvenience of traveling long distances to all-Negro schools; second, the inequality in the age and value of buildings; third, the difference in the quality and quantity of books; and fourth, the evils of segregation per se. The last point received the greatest emphasis, and as all five cases went to the Supreme Court, this became the critical factor in the 1954 decision of Chief Justice Warren.

Buildings and Books

Before taking up the argument on segregation per se, we shall sum up the courtroom battle over buildings and books. Mr. Goodell, the Defense Attorney, knew that I had secured the insurance evaluation figures for the public school buildings and was obviously prepared to meet the anticipated argument.

Mr. Goodell attacked from several angles in his cross examination. First, he had objected to admission, as an exhibit, the maps I had prepared showing the evaluation per classroom for each of the buildings. (46,p.9) Next, in the course of testimony, he entered objection to my using these figures. At one point he was upheld, but the plaintiff lawyers were able to bring it in later with a little different approach. On the stand, I was asked by Mr. Greenberg not only to give summary figures but also to make comparisons, building by building. This latter procedure was rather tedious but was designed to make an impression on the court by pointing out specific differences in the various buildings.

Mr. Goodell argued that we might have used the total value of a building rather than the classroom value. I again explained that this would not have produced comparable figures since buildings vary in size. He then argued that insured costs were not necessarily full evaluation. It was finally established that the Board generally insured their buildings for 80% of the current value. (46,p.86) He admitted this figure; therefore, it served as a reliable and uniform basis of comparison.

At one point Mr. Goodell objected to my testimony on the grounds that I had not qualified as an expert in insurance and engineering, which was true. But, as Mr. Greenberg pointed out, I was simply using Board of Education figures which Mr. Goodell could hardly reject. Finally, Mr. Greenberg managed to allow me to testify that the average age of Negro buildings was 33 years and the average age of white buildings was 27 years. Also, that 45% of the white children attended schools that were newer than

the newest colored buildings whereas only 14% of the white children attended schools that were older than the oldest colored building. Another comparison showed that 66% of all white children attended schools that were newer than the average age of the colored buildings. As to insured value per classroom, the average for the white schools was \$10,517.00 and the average for the colored schools was \$6,317.00, or stated another way, the insured value per available classroom was 66% higher for the white schools. (46,p.89)

At one point in the cross examination Mr. Goodell started through an exhibit of the cost and sizes of the school buildings which I did not have. He brought it over and, on the spur of the moment, tried to get me to follow him through the argument. To me, it seemed primarily like the logic from the old phonograph record of the 1920's in which the Two Black Crows discussed why the white horses ate more than the black horses. (There were more white horses.)

Mr. Goodell's last stand on the differences of building evaluations was that there was a small percentage of white children who were obliged to go to schools that were older than the oldest Negro school, about 14% in fact. This, he argued, made it all right. That evening Mr. Carter very aptly quoted a famous judge to the effect that indiscriminate dissemination of injustice is no substitute for equal protection of the laws.

As the testimony shows, Mr. Goodell tried vigorously to get me to isolate out the building factor alone and say whether or not that would be a decisive factor in the quality of education. This became something of a quibble. I did not like to draw a conclusion from a single factor. I finally told the court that educators and psychologists had a word which explained my position on this, namely, the word "gestalt", which means that the whole is greater than the sum of its parts. Therefore, to isolate out a single factor would somewhat distort the total meaning. At this, a snicker went through the workshop group and Judge Mellot leaned over the railing and asked, "Doctor, what was that word again?" So I spelled it out for him and defined it. Mr. Goodell dropped the argument at this point.

After I had been on the stand for nearly two hours (about half of it under cross examination), Mr. Goodell said, "No more questions," and the court adjourned for a fifteen minute recess.

During the break, someone came running up to me and said, "Get ready, they are going to call you back on the stand and question you further about the survey of the book situation."

Below is a complete transcript of this extension of the cross examination.

MR. GOODELL: I would like to recall Dr. Speer for two short questions.

JUDGE HUXMAN: Dr. Speer, take the witness stand for a question or two further.

Hugh W. Speer, having been previously sworn, reassumed the stand and testified further as follows:

Cross Examination
(Continued)

MR. GOODELL: Dr. Speer, in giving your opinion here a moment ago as to the comparison based upon library books...in the Negro schools to certain of the white schools covered by your testimony, did you consider, in forming that opinion, the fact that the Parent Teacher Association in the various school territories contribute personally and raise the money to buy those books, and they are not furnished by the Board of Education?

DR. SPEER: Yes, I have been informed that that is sometimes the case.

MR. GOODELL: Well, how did you segregate which books have been bought by Parent Teachers Associations and the books that have been furnished by the Board of Education?

DR. SPEER: I didn't make that separation. I felt that by neglect the Board of Education permitted an inequality to exist.

MR. GOODELL: State whether or not any of the books in any of the libraries or rooms in the schools that you made the investigation concerning books, that at the end of the term the books, some of them, were gone, that is, packed up in boxes.

DR. SPEER: Yes, we understood that, and we also understood that some of the books are regularly kept in the central office of the Board of Education, and we took that into accounting, knowing that those books are taken out of all the schools and kept in the Board of Education office so that what remained...form the basis for comparison.

MR. GOODELL: So if some of the books were missing, either being packed up or gone, and you didn't know what they were, you are just basing your testimony, your considered opinion, on what you found, is that right?

DR. SPEER: Sir, the books that were gone are the books that circulate among all the buildings in the course of the year, so we assume that those are equal. It's the books that are left in the building that really belong to that building, and it is on that basis that we made our differential.

MR. GOODELL: Were some of them packed up?

DR. SPEER: Some of them packed up, and we looked into the boxes.

MR. GOODELL: Did you take them all out volume by volume and examine them?

DR. SPEER: We did not examine every book in the Topeka school system, but we sampled it in an unbiased way. We sampled a large number of rooms and a large number of boxes in a large number of buildings, but we did not examine every book.

MR. GOODELL: You mean you took a book out here and there from a box and, from that, made up your mind that they were all alike and, consequently, that is the way you got at your opinion.

DR. SPEER: We took a sample that was representative and large enough to where we could feel confident in it.

JUDGE HUXMAN: Is that all?

MR. GOODELL: Which books were bought in the various schools that you gave your opinion about--were bought by the Parent Teachers Association?

DR. SPEER: I don't know just which books. Some, no doubt, were but not a great many. It is not enough to affect the percentage very much.

MR. GOODELL: If you don't know what books they were, some of the books you didn't even examine, you don't know what quantity they are, how do you get at an opinion as to book facilities at the various schools?

DR. SPEER: On this basis, sir, that it is the books in the school that are responsible for the education of the child, and we examined the books in the school and, on that basis, we made our opinion.

MR. GOODELL: So what you are saying, if I understand you right, the books you found and examined showed less books or inferior quality as to date and so forth in the colored schools than the books you found in the white schools, is that right?

DR. SPEER: Yes, sir.

MR. GOODELL: All right.

JUDGE HUXMAN: Step down. (46., p.127-130)

The fact was that the Topeka schools were budgeting only 42¢ per year per pupil for the purchase of books in 1951. Even the Kansas State Department of Education at that time was advocating a minimum of \$2 per year per pupil for books. Although this situation has no doubt improved in Topeka, and elsewhere through the country in the last 15 years, it is still a conspicuously low percentage of the total budget that goes for books in a great many school systems. In one building at Topeka, McKinley, a colored school, the team of teachers from Kansas City estimated that three-fourths of the books were too old to be suitable for school use.

Near the end of the case, Thelma Mifflin, Clerk of the Board of Education, was put on the stand by the defense and testified to the effect that any difference in books between the buildings was largely due to the fact that many P.T.A.'s spent considerable money for books and others did not. (46., p.127) Obviously, the Negro schools, if they had a P.T.A. at all, might not have one that was able to provide an adequate supply of books. In other words, children coming from homes deprived of adequate books seemed to have the same inadequacies at school. This sample is especially interesting now in comparison to the statement of Thurgood Marshall in his interview on April 3. In reply to a leading question on sins of omission by Boards of Education, he said, "Well, that's coming close now. I would say that in a couple of years...failure to supply the necessary state machinery to assure equal protection of the laws is in and of itself a denial of equal protection of the laws." (32.)

It is also significant to note here the findings by Coleman in the 1966 report of the Civil Rights Commission on the Equality of Educational Opportunity:

"...the achievement of minority pupils depends more on the schools they attend than does the achievement of majority pupils." (4., p.22)

In other words, the greater the vacuum at home the more noticeably the school can fill it, assuming the school has adequate resources. However, in Topeka, in 1951 the book shortage of the minority group homes tended to exist in the school also. The Board of Education passed the responsibility to the Negro P.T.A. which were non-existent or economically impoverished.

Compensatory education had not as yet become recognized as public responsibility.

Mrs. Mifflin, was asked by Mr. Goodell to go back over a number of points which we had already admitted. The purpose was probably to emphasize the equalities among a number of other factors such as salaries, teacher load, preparation, etc. (46.,p.214) Judge Hill intervened with the statement that there had been nothing said to the contrary.

City and School District Joint Planning

At the Topeka trial, city plans which included the location and construction of school buildings came up for discussion, including a long-range city plan program developed by Harlan Bartholomew and sponsored by the city commissioners, county commissioners, and the Board of Education. When Mr. Greenberg questioned me about the plan, the objection to his question was sustained on the grounds that it had not been admitted to evidence. Mr. Goodell had argued that the plan had not been considered jointly by the Board of Education and city commission. (46.,p.94) In the testimony of Mr. Saville, member of the Board of Education, he had trouble recalling anything about the plan. (46.,p.13) Later in my cross examination, the following exchange took place:

MR. GOODELL: You realize that school buildings are built as a community grows up and population trends--where the town grows and which way it grows, determines whether buildings are located and newer buildings are added.

DR. SPEER: That is one factor.

MR. GOODELL: Do you know of any way on earth to keep those facilities adequate and at the same time equal in any school system?

DR. SPEER: There are ways that it can be approached.

MR. GOODELL: Well, just tell me how you would approach it.

DR. SPEER: By undertaking good cooperative city planning with the Board of Education and the City Commissioners on a long-term scale and then following it.

MR. GOODELL: Would you recommend that if we had a building like, say in Topeka, that cost \$112,000 and is now a sound and structurally safe colored building, that you tear that down because we happen to have a new building built a year ago that cost a half million dollars; would you recommend that?

DR. SPEER: Not merely for that reason, no.

MR. GOODELL: What other reasons would you have for tearing it down?

DR. SPEER: If I found that throughout the community the colored children's buildings were decidedly inferior to the buildings of the white schools, then I would consider that to be an unequal education opportunity between the groups.

MR. GOODELL: Well, now, let's talk about that subject. Let's talk about Quinton Heights and Polk Street and Lafayette School and Lowman School, all of which have a physical plant value at the time they were built and at the present time, an insurance value less than any of the four colored schools. Do you think that makes the white children get inferior education to the colored children going to those schools?

DR. SPEER: The colored children are getting an inferior education I think, for this reason: That, as I cited in my original testimony, 45% of the white children can go to schools that are newer than the newest colored building; only 14% of the white children have to go to schools that are older than the oldest colored building, so it's a comparison of 14% against 45%. (46., p.110)

Buildings and Environment

Dr. Buchanan's testimony on buildings followed much the same line, but he stated more precisely and more definitely that the quality of the buildings and their environment was directly related to the quality of education, and when asked to do so he cited such authorities as Reeder of Ohio State University and Strayer and Englehart of Columbia University. He then responded to the questions of Mr. Greenberg by pointing out specific comparisons between certain Negro schools and certain white schools. (46., p.30) Although, again, this testimony was a bit tedious and perhaps could have been summed up in much less time, the human mind seems to be more impressed by specific examples. On cross examination of Dr. Buchanan, the following discussion took place:

MR. GOODELL: Dr. Buchanan, if I understood you correctly, you are stating that the plant or the building is a very important factor in the educational opportunity.

DR. BUCHANAN: Yes.

MR. GOODELL: The building a child goes to.

DR. BUCHANAN: Yes indeed.

MR. GOODELL: And, therefore, where you have one building with shrubbery around it and landscaping, which is pretty, and another building built earlier many years ago which isn't as pretty, even however strong and commodious and sufficient, if it isn't as pretty and big and new and as modern, that educational opportunity is minimized in the child that goes to that building, is that right?

DR. BUCHANAN: That would be--other factors being equal, I would say the better one--

MR. GOODELL: I am restricting it to that factor if I understood your testimony.

DR. BUCHANAN: That's right; I would say that that would be detracting from it.

MR. GOODELL: The only way children in any community could have an equal educational opportunity would be to have buildings all beautiful, built about the same time, all modern, all beautifully landscaped and everything just about alike, isn't that right?

DR. BUCHANAN: As far as that factor is concerned, that is correct.

MR. GOODELL: As a practical matter, don't you realize that we live in a practical world?

DR. BUCHANAN: I have lived in it for nearly fifty years.

MR. GOODELL: How do you think any Board of Education could have all of the buildings built at the same time, same landscaping--

JUDGE HUXMAN: You need not answer that question; that is argumentative; has no probative value.

MR. GOODELL: Well, according to your theory, if I understand it right, if I went to a little country schoolhouse, even though I had good teaching and good texts and all other facilities, but not a building as good as Randolph, I was in a bad way, or anybody would be in a bad way, to get an education, is that right?

DR. BUCHANAN: No, that isn't my theory. My theory would be you would get a better education if you had better equipment, but you would not--I wouldn't say you would have a poor education because you went to a poorer building. You might have a very superior teacher or you might have very superior ability yourself.

MR. GOODELL: Buildings don't make the educated child, does it (do they)?

DR. BUCHANAN: I wouldn't say entirely, no; they are a contributing factor, but not the entire thing. (46.,p.142-143)

The defense repeatedly responded to unfavorable comparisons between white and colored schools by pointing out inequalities between white schools too. At one point in my testimony, Mr. Goodell objected in these words:

MR. GOODELL: He is comparing, it's true, with a colored plant, but he is also in the other part of his testimony---he has shown that the same disparity exists between many white schools as to the newer schools where we have very old schools, very low cost per capita per room, classroom, and also the testimony very obviously shows no school system in the world could have buildings equal because newer buildings necessarily incorporate modern facilities not known when they were built twenty or thirty years ago.

MR. GREENBERG: May I answer that, Your Honor?

MR. GOODELL: I address that to the Court, not you.

MR. GREENBERG: I didn't ask you whether I could answer it.

JUDGE HUXMAN: The witness may answer.

DR. SPEER: Proceeding, on the other hand, we might say the Randolph building has these features, a much more attractive kindergarten room, more spacious playground, much more attractive surroundings which adds to its aesthetic educational value, and I would add, if I may consult my notes a moment here---

MR. GREENBERG: Go ahead.

DR. SPEER: That the books in the Randolph School are better than the books in the Buchanan building, in my judgment. There are better heating and lighting in the Randolph building, and I think I would add, Your Honor, that the most important of all the curriculum in the Randolph building provides a much better educational opportunity than the one in the Buchanan building, because, in the Randolph building, the colored child would have opportunity to learn to live with, to work with, to cooperate with white children who are representative of approximately 90% of the population of the society in which he is to live. (46.,p.102-103)

The Curriculum and Segregation Per Se

Mr. Greenberg asked me about the school curriculum:

MR. GREENBERG: Dr. Speer, did you examine the curriculum in the schools in the City of Topeka?

DR. SPEER: Yes.

MR. GREENBERG: Tell the Court what you mean by "curriculum," also.

DR. SPEER: By "curriculum" we mean something more than the course of study. As commonly defined and accepted now, "curriculum" means the total school experience of the child. When it comes to the mere prescription of the course of study, we found no significant difference. But, when it comes to the total school experience of the child, there are some differences. In other words, we consider that education is more than just remembering something. It is concerned with a child's total development, his personality, his personal and social adjustment. Therefore it becomes the obligation of the school to provide the kind of an environment in which the child can learn knowledge and skills and social attitudes and appreciations and interests, and these considerations are all now part of the curriculum.

MR. GREENBERG: I see, Dr. Speer. Do you have anything further to say?

DR. SPEER: Yes. And we might add that the more heterogeneous the group in which the children participate, the better they can function in our multi-cultural and multi-group society. For example, if the colored children are denied the experience in school of associating with white children, who represent 90% of our national society in which these colored children must live, then the colored child's curriculum is being greatly curtailed. The Topeka curriculum or any school curriculum cannot be equal under segregation. (46.,p.90-91)

Along this same line, I suggested to Mr. Carter later that he ask Dr. Kenneth McFarland, Superintendent of Topeka Schools, about the comprehensive theory of curriculum as expressed by Lee and Lee in their curriculum book which was popular at the time. Dr. McFarland testified as follows:

MR. CARTER: This statement appears, and I would like to get your views on this: "No longer is the curriculum to be considered a fixed body of subject matter to be learned. We realize only too well that the curriculum for each child is the sum total of all of his experiences which are in any way affected

by the school. However rich or valuable any printed course of study may seem to be, the child benefits not at all if he does not have those experiences in the classroom." Now, would you agree or disagree with that statement?

SUPT. MCFARLAND: Well, you lift one statement like that out of its context in an educational philosophy--it's a little difficult to say whether you would agree with the single statement or not. We would have to know the background of that, what led up to it.

MR. CARTER: The statement is--follows a philosophy that the sum total of a child's experience throughout the school--is the curriculum, not merely the subjects in the school. Now, do you or do you not agree with that?

SUPT. MCFARLAND: I would agree with that in principle, but, of course, you understand, when you go to that theory of education that the child is in the public schools a small percentage of his total living hours, that puts the curriculum over into a field that is largely out of control of the schools. (46., p.238-239)

Several times in my testimony when pressed by Mr. Goodell to speak of the inequalities between school buildings, I mentioned not only physical facilities but moved on into the handicaps of segregation per se. Considerable quibbling was heard and finally Judge Huxman pointed out that we were not getting together very well. Then he attempted to sum up my testimony as follows: He asked first for clarification, "To be sure I understand Dr. Speer's answer, is one of the reasons which is common to all three of these schools, your reason that by segregation they are denied in all three of these schools the opportunity to mingle and live with the white children, which they would otherwise have and that is an important factor--is that part of your answer?"

I replied, "Yes, your honor, that would enter into all of them." (46., p.104)

The Judge Sums Up

A little later Judge Huxman intervened with a clarification for the defense:

MR. GOODELL: You know in a great many cities and communities of the United States there are statutes similar to the statutes here in Kansas which we have had for a half century or three-fourths of a century, isn't that right?

DR. SPEER: I presume so.

MR. GOODELL: You know, as a practical man, laws get passed by legislators coming from the various parts of their communities over the state, don't you?

DR. SPEER: Yes, sir.

JUDGE HUXMAN: Mr. Goodell, what is the purpose of that question? What value does that have to our problem how laws are passed.

MR. GOODELL: I am getting to that. I can't ask it all at once. I am trying to get from this witness the feature as to whether he thinks elimination of racial segregation, if it's unwanted by the community and is out of step with the thinking of the community which the mere existence of the laws have some indication---

JUDGE HUXMAN: I think Dr. Speer has made it quite clear from his evidence---he has to me at least, if I understand it---that segregation, racial segregation, is the prime and controlling factor of the quality of the whole curriculum and that these physical factors are secondary, and that his testimony, as it registered with me, is that aside from racial segregation he perhaps would not testify that there was any such inequality in the physical properties as would deny anybody an equal educational opportunity. Do I understand your testimony correctly?

DR. SPEER: I may say, Your Honor, I think I would sum up this way: That there is, in my opinion, some inequality in physical facilities between the groups in Topeka, but, in addition to that, there is also the difference of segregation itself which affects the school curriculum.

JUDGE HUXMAN: Let's see if I can get myself straightened out. Do you not also agree with what Mr. Goodell is trying to bring out here--you haven't gotten together--that if you put it on that fact, that there is inequality in physical facilities as between the white schools and the colored schools, sometimes the greater facilities are with the colored schools against the older white schools.

DR. SPEER: Yes, Your Honor, but they are not as many in that direction as they are in the other direction in this case.

JUDGE HUXMAN: I seems to me we are spending a lot of time on that when, it seems to me, it would be obvious if you have an older white building than a colored building that perhaps the physical facilities in the older white building would be poorer than the colored building.

DR. SPEER: Yes, I will agree.

MR. GOODELL: I will try to shorten this up...It's your opinion, then, that you can't have separate schools in any public school system and have equality, is that right?

DR. SPEER: Yes.

MR. GOODELL: And that is predicated on the--on your philosophy or your theory that merely because the two races are kept apart in the educational process, isn't that right, mere separation causes inequality.

DR. SPEER: That is one of the things which causes inequality, yes sir.

MR. GOODELL: Yes. Now, assuming, Doctor, that we didn't have separate schools and they were all together, and you still had a social situation in this community which didn't recognize co-mingling of the races, didn't admit them on free equality, that child would run against those--run up against those things in his practical every-day world, wouldn't he?

DR. SPEER: I presume so.

MR. GOODELL: Sir?

DR. SPEER: I would think so.

MR. GOODELL: Wouldn't that tend to cause more of a tempest and emotional strain or psychological impact if he got used to going to school with white children then when he went downtown and couldn't eat in a white restaurant, couldn't go to a white hotel and couldn't do this and that, wouldn't that make the impact greater and accentuate that very thing.

MR. GREENBERG: This witness is qualified as an expert in the field of education, and I don't believe he has testified or is qualified to testify concerning segregation all over the State of Kansas or elsewhere.

MR. GOODELL: Well, I restrict it to Topeka.

JUDGE HUXMAN: I think the Court will sustain the objection. That is purely argumentative. I doubt whether the doctor has qualified himself.

MR. GOODSELL: Assuming, Doctor, we will restrict this to the educational process, assuming that--that we didn't have segregation, for the purpose of this question, and assuming further we had a Negro child going to Potwin or Oakland or Randolph and assuming that the population trend appears in the schoolroom as it does in our city, so that he would be outnumbered from twenty to fifty to one, assuming all that, for the purpose of this question as being true, wouldn't that cause some inferiority feeling on the part of the colored child when he went to such a school where he was outnumbered twenty to fifty to one and caused some sort of mental disturbance and upset.

DR. SPEER: On which basis would you rather for me to--on theory or on personal observation or experience?

MR. GOODSELL: I am talking about theory here.

DR. SPEER: And personal observation and experience.

MR. GOODSELL: Yes.

DR. SPEER: Let me first mention the latter one; we have adjoining our campus a demonstration school of 210 students in the elementary grades and mixed in with them are about ten Negro children, so they are outnumbered in that proportion, and my observation is, and the reports I receive from my assistants are, that those children are very happy, very well adjusted, and they are there voluntarily. They don't have to attend...I think, also, on the basis of our knowledge of child behavior that we can say on a short-range basis there may be occasionally, the first time we jump into water we may be a little bit frightened, but, on a long-range basis, we generally are able to work out our adjustments and make a good situation out of it. (46.,p.119-123)

A Little Pink?

Mr. Goodell had been saying that there was social stratification even among white students causing some to feel "left out of things." He said, "And a child that is left out of the swim, so to speak, feels inferior or second class, doesn't he?"

I replied, "Yes, and I think we should prevent that in all cases possible."

Then Mr. Goodell seemed ready to move into the McCarthy arena, a shift to which the Court seemed especially alert.

"You wouldn't make a new social order to prevent social strata of society, would you?" asked Mr. Goodell.

Before plaintiff lawyers had time to get to their feet and object, Judge Huxman quickly interrupted: "Just a minute, the Court will sustain an objection to that question." Then immediately, "Objection sustained." (46.,p124-125)

An Unscheduled Lawyer

During my cross examination, an elderly lawyer, well known to the Court, walked in and took his place with the other lawyers. His equilibrium seemed a bit uncertain. He soon jumped to his feet and said, "I object to that!"

Judge Huxman responded, "Are you entered here as an attorney of record?"

He replied, "I am supposed to be."

Judge Huxman said, "Go ahead."

"I object," the lawyer said, "because he is invading his rights and he is answering a question not based upon the evidence abduced--or that could be abduced."

Mr. Goodell intervened for the defense, "You just got here, you wouldn't know."

And the lawyer said, "Yes, I do know."

Judge Huxman said, "Objection will be overruled." (46.,p.123-124)

At that point the old gentleman sat down, put his face on his desk, went to sleep and peacefully slumbered through the remainder of the afternoon.

In our interview with Judge Huxman in the fall of 1966, one of the first things he asked me, with a chuckle, was whether or not I remembered this incident. I told him that I did remember it very well. Then he told the interesting sequel. As the three judges left the court room that evening, Judge Mellott said to the other two, "Do you suppose that this lawyer was drunk when he came into the courtroom?"

Judge Huxman explained that Judge Mellott was an old-time Kansas Puritan and an ex-school teacher who had never even smelled bourbon, let alone tasted it. Judge Huxman and Judge Hill realized that if Judge Mellott suspected that this lawyer had come into the courtroom intoxicated that he would insist upon contempt proceedings. Wishing to avoid any chance of such an embarrassment, Judge Hill rose to the occasion and said, "Oh, no, no, he wasn't drunk, he was just putting on an act, as he often does." (29.)

Leadership Responsibility of Educators

The degree of responsibility and initiative that the school should take toward social conditions is a continuing issue. Superintendent McFarland testified for the Board of Education as follows on the relation of the school and social custom:

MR. GOODELL: Have you ever, as an administrator of schools, considered it part of your business to formulate custom and-- social customs and usage in the community?

SUPT. MCFARLAND: Mr. Goodell, I think that point is extremely significant; in fact, it's probably the major factor in why the Board of Education is defending this lawsuit, and that is that we have never considered it, and there is nothing in the record historically, that it's the place of the public school system to dictate the social customs of the people who support the public school system.

MR. GOODELL: Do you say that the separation of the schools that we have is in harmony with the public opinion, weight of public opinion, in this community?

SUPT. MCFARLAND: We have no objective evidence that the majority sentiment of the public would desire a change in the fundamental structure. (46., p.231)

Mr. Carter questioned Supt. McFarland further on the leadership role of the schools in social reform. In this discussion, relative rights of the majority and the minority in a democratic society came up:

MR. CARTER: Mr. McFarland, I think you said that you didn't consider it the function of the Board of Education to go against the prevailing opinion with regard to the maintenance of public schools.

SUPT. MCFARLAND: I said the social customs of the people. I didn't think it was the purpose of the school system to dictate the social customs of the people who support the schools. That has been our policy.

MR. CARTER: Now, how do you know that social customs of Topeka require the maintenance of separate schools at the elementary school level?

SUPT. MCFARLAND: I said we had no objective evidence that the majority of the people wishes to change the fundamental structure which we have.

MR. CARTER: Would you say that there is a difference in the social or public opinion or social customs with regard to the maintenance of segregated schools above the elementary school level? (where they were integrated.)

SUPT. MCFARLAND: I didn't say that.

MR. CARTER: Would you say? I am asking you a question.

SUPT. MCFARLAND: I don't know; I wouldn't pass on that. You see, we are operating the schools under essentially the same structure that we took them over in 1942.

MR. CARTER: But you are operating schools that have mixed characteristics, do you not? You are operating schools that are segregated at the elementary school level, integrated beyond. Now why does the Board of Education feel that they are maintaining that type of operation?

SUPT. MCFARLAND: Well, we have--

MR. GOODELL: Just a minute. Objection to this question because it assumes as a part of the question--assumes that part of this integration is caused by public policy of the Board. The Supreme Court decision in the case of Graham v. Board of Education, decided that there couldn't be a separation in the seventh and eighth grade where we had a junior and senior set up. There is a policy set up on it in cities of the first class, all except Kansas City, which is controlled by another statute, so it isn't a matter of policy of the Board.

JUDGE HUXMAN: I doubt if there is very much value to this whole line of questions.

MR. GOODELL: My point is that the law compels them to have integrated system as to junior high and high school.

JUDGE HUXMAN: The witness may answer the question.

MR. GOODELL: If the Court please, I insist again my objection is proper. He is asking the doctor to distinguish the board forming a policy, saying in the elementary grades they will be separate and in the others it won't; it isn't a matter of choice with them as to junior high and high school. It's fixed by law.

JUDGE HUXMAN: The objection will be overruled.

SUPT. MCFARLAND: The answer is essentially that given by the attorney. The board has had no vote upon whether or not they would segregate the schools above the sixth grade nor have the people--the public that they represent.

MR. CARTER: I see. So, actually, you are not maintaining-- you can't really say you are maintaining the schools in accord with social custom. You merely have kept constant the status quo as you found it when you came here nine years ago. You are maintaining segregated schools merely because they were here when you arrived; that's all you can say, isn't that true?

SUPT. MCFARLAND: We have, as I stated, no objective evidence that there is any substantial desire for a change among the people that the board represents. (46.,p.233-236)

Social Custom and the Fourteenth Amendment

After the above discussion regarding school boards following the opinion of the majority, Judge Huxman intervened with this question:

JUDGE HUXMAN: May I ask counsel on both sides, assuming that is true, assuming the schools are maintained in accordance with social customs and the wishes of the people, or that they are not, what bearing does that have on the right to so maintain them under the Fourteenth Amendment?

When the replies he received failed to answer his question, Judge Huxman showed some impatience with the "social custom" argument and finally said: "The question is what the Fourteenth Amendment warrants and what it doesn't. We don't care what social custom provides." With obvious delight, Mr. Carter replied, "We agree with that, your honor." (46.,p.237)

The Behavioral Science Arguments

The first expert witness in the Behavioral Science group was Dr. Horace B. English, professor of Child Psychology at Ohio State University. When asked about his qualifications, he gave a long list of memberships, offices, responsibilities, writings, and research. The following excerpts are taken from Dr. English's testimony:

MR. GREENBERG: Would you say that on the basis of your learning experience and study that on the basis of color alone there is a difference in ability (of school children) to learn?

DR. ENGLISH: No, there certainly is not...from color alone there is no telling. We know that the Negro child, moreover, learns in the same way, that he uses the same processes in learning and learns the same things, but I do make one exception; it is a notable exception: If we din it into a person that it is unnatural for him to learn certain things, we din it into a person that he is incapable of learning, then he is less likely to be able to learn...there is a tendency for us to live up to or perhaps I should say live down to the social expectation and to learn what we think people say we can learn. Legal segregation definitely depresses the Negro expectancy, and it is therefore prejudicial to his learning. If you get a child in the attitude that he is somewhat inferior and he thinks to himself, "Well, I can't learn this very well," then he is unlikely to learn it very well.

MR. GREENBERG: Dr. English, is there any other scientific evidence to support this conclusion which you have stated other than what you have said?

DR. ENGLISH: Yes, there is a good deal. For example, in the last war we took the people who were illiterates. These, of course, a good many more of them were colored than white, but we put them into schools to teach them fourth grade literacy and, as a matter of fact, 87% of the Negroes and 84% of the whites successfully completed the work of these schools. Now, I don't make anything of the difference of 3% in favor of the Negroes as compared to the whites. That is, of course, within the range of accidental error, but I say these results do show that under favorable conditions and under conditions of motivation where these men wanted to learn, the Negro men proved that they can learn as well as the whites...Wherever we try to equalize the opportunities, we minimize or extinguish the differences in learning ability as between the two racial groups. Perhaps the best study of this is Dr. Klineberg's study showing the results of the migration to New York City of children from the deep South...the Negroes, in coming out of these very poor school situations, had very low ability to learn. They seemed stupid and their intelligence test scores were low, but each year that they were in the more favorable learning opportunities of the North, their intelligence quotients were rising. (46.,p.145-155)

Later, Dr. English noted, that "first of all segregation is seemingly based upon a policy of a difference. And then by the mere fact of segregation it turns around and creates the greater difference which it assumes to have been present in the beginning and we get into a vicious cycle." (Following are several samples of the dialog between Mr. Goodell and Dr. English in the cross examination.)

MR. GOODELL: Dr. English, this opinion you have rendered is somewhat founded upon theory, is it not?

DR. ENGLISH: No sir, it is based upon literally thousands of experimental studies.

MR. GOODELL: Well, is it possible that you could be in error in some of your conclusions? Could you be mistaken about some of them?

DR. ENGLISH: Every man can be mistaken; certainly I can.

MR. GOODELL: You could be mistaken, couldn't you?

DR. ENGLISH: Oh, yes.

MR. GOODELL: Have you given this expert testimony around the country in cases such as this?

DR. ENGLISH: No sir, never before. I teach it...

MR. GOODELL: Would it change your opinion any if the facts present in this community were that the child, the Negro child that we are dealing with, if he went to a white school where he would be outnumbered ten to one, or fifty to one?

DR. ENGLISH: Not at all. I have seen that happen. I have grown up in schools where that happened. I have seen it happen repeatedly. We have it in our own city...the majority would generally have a preponderant voice if they divided along racial lines which they tend to do, but which they do not invariably do. I have seen many cases where the colored child receives, in a mixed school, from a majority school, considerable amount of status and honor. You may recall just recently a man who was elected captain of the football team in a predominantly white school...

MR. GOODELL: And there are some outstanding Negroes in different fields or professions in the deep South who have received parts of their education in segregated schools?

DR. ENGLISH: That is true.

MR. GOODELL: And yet have achieved great places of importance. Isn't that right?

DR. ENGLISH: Education isn't the whole answer to ability; it is merely one factor. There are men who are big enough, white or black, to rise above unfavorable circumstances. (46.,p.155-160)

Dr. Wilbur B. Brookover of Michigan State

The next witness, Dr. Wilbur B. Brookover, again was qualified as an expert witness on the basis of an extensive educational background, research, writing, memberships, and honors. He gave his special interest as social psychology with particular reference to human relations in the school, the school as a social institution, and the relations between minority and majority groups in society.

Dr. Brookover was first asked if he thought the Negro children of Topeka could receive as good an education in their segregated schools as they could in an integrated school, and he said, "No, I would not." When asked for the basis of his opinions, he replied as follows:

MR. BROOKOVER: Well, I would say, first of all, that I would want to emphasize the nature of the educational process in this respect: Education is a process of teaching youth to behave in those ways that society thinks is essential. In our society it has been held that this is a necessary function, to prepare democratic citizens. Now, the child acquires these essential behavior patterns in association with other people. In other words, they are not fixed; they are not inherent in the behavior of the child, but they are acquired in a social situation. Now, in order to acquire the types of behavior that any society may expect and to learn how to behave in various situations, the child must be provided an opportunity to interact with and understand what kinds of behavior are desired, expected, in all kinds of situations. This is achieved only if the child has presented to him clearly defined models.

MR. GREENBERG: What do you mean by models, Professor?

MR. BROOKOVER: Examples, illustrations of behavior; persons behaving in the ways that are--that the child is expected to behave and also consistent behavior of this sort. In other words, the child cannot learn to behave in the way that he is expected to behave if at one time he is presented one kind of an example, one kind of a model, and another time he is presented another kind of model, and there is a constant confusion. Now that, I think, leads us immediately to the situation with regard to segregated schools. In American society we consistently present to the child a model of democratic equality of opportunity. We teach him the principles of equality; we teach him what kind of ideals we have in American society and set this model of behavior before him and expect him to internalize, to take on, this model, to believe it, to understand it. At the same time, in a segregated school situation he is presented a contradictory or inharmonious model. He is presented a school situation in

which it is obvious that he is a subordinate, inferior kind of a citizen. He is not presented a model of equality and equal opportunity and basis of operating in terms of his own individual rights and privileges. Now, this conflict of models always creates confusion, insecurity, and difficulty for the child who can not internalize a clearly defined and clearly accepted definition of his role, so he is faced with situations which he doesn't--he has two or three, at least two in this situation, definitions of how he is expected to behave. This frustration may result in a delinquent behavior or otherwise criminal or socially abnormal behavior. Now the Negro child is constantly presented with this dual definition of his role as a citizen and the segregated school perpetuates this conflict in expectancies, condemns the Negro child to an ineffective role as a citizen and member of society.

MR. GREENBERG: Dr. Brookover, this opinion and the reasons you have just given, are they supported by scientific authority?

MR. BROOKOVER: Yes, there is extensive work being done by psychologists, social psychologists, on the whole theory of role-taking and the question of internalization of patterns of expectancy. Such people as George Herbert Meade, Charles Horton Cooley and numerous other people have done extensive work, extensive research in the processes of personality development and learning a situation through social interaction.

MR. GREENBERG: That is all. (46.,p.160-165)

In cross examination, Mr. Goodell gave the names of several well-known Negroes who had achieved considerable distinction and asked Dr. Brookover if he had heard of them.

Dr. Louisa Holt

Dr. Louisa Holt (now Dr. Louisa Howe) was qualified by three degrees from Radcliffe College, as a researcher in connection with the Menninger Foundation School of Psychiatry, and as a teacher at the University of Kansas. She had had several intern experiences with the Bureau of Prisons and in psychiatric hospitals.

Dr. Holt was asked, "In your opinion does enforced separation have any effect on the personality development of the Negro child?" Dr. Holt replied as follows with words that are closely akin to those used by Judge Huxman in that part of his decision that was quoted by Chief Justice Warren:

DR. HOLT: The fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which inevitably is interpreted both by white people and by Negroes as denoting the inferiority of the Negro group. Were it not for the sense that one group is inferior to the others, there would be no basis, and I am not granting that this is a rational basis, for such segregation.

MR. CARTER: Well, does this interference have any effect, in your opinion, on the learning process?

DR. HOLT: A sense of inferiority must always affect one's motivation for learning since it affects the feeling one has of one's self as a person, as a personality, or a self or an ego identity, as Eric Erickson has recently expressed it. That sense of ego identity is built up on the basis of attitudes that are expressed toward a person by others who are important. First the parents and then teachers, other people in the community, whether they are older or one's own peers. It is other people's reactions to one's self that one has. If these attitudes that are reflected back and then internalized or projected, are unfavorable ones, then one develops a sense of one's self as an inferior being. That may not be deleterious necessarily from the standpoint of educational motivation. I believe in some cases it can lead to stronger motivation to achieve well in academic pursuits, to strive to disprove to the world that one is inferior since the world feels that one is inferior. In other cases, of course, the reaction may be the opposite, an apathetic acceptance, fatalistic submission to the feeling others have expressed that one is inferior and therefore any efforts to prove otherwise would be doomed to failure.

MR. CARTER: Now these difficulties that you have described, whether they give a feeling of inferiority which you were motivated to attempt to disprove to the world by doing more, or whether they give you a feeling of inferiority and therefore cause you to do less, would you say that the difficulties which segregation causes in the public school system interfere with the development of a well-rounded personality?

DR. HOLT: I think the maximal development of any personality can only be based on the potentialities which that individual himself possesses. Of course they are affected for good or ill by the attitudes, opinions, feelings, which are expressed by others and which may be fossilized into laws. On the other hand, these can be overcome in exceptional cases.

A little later Dr. Holt was asked, "Is the integration of the child at the Junior High School level able to correct these difficulties which you have just spoken of?" She answered as follows: "I think it is a theory that would be accepted by virtually all students of personality development--that the earlier a significant event occurs in the life of an individual the more lasting, the more far-reaching and deeper the effects of that incident, that trauma will be; the earlier the event occurs the more difficult it is later to eradicate those effects." (46.,p.170-176)

In the cross examination, Mr. Goodell went into the question of the merits of competition and the strength gained by a young person having to battle poverty and other handicaps.

The Testimony Cumulative?

At this point in the proceedings Judge Huxman intervened to say, "Well, now we are not disposed to be critical but it is my opinion from having listened to this testimony of the last three or four witnesses that it's all cumulative." (46.,p.180) He then agreed to have one more witness and urged the attorneys to limit their testimony the following morning. Apparently the witnesses were beginning to sound more and more alike to the bench near the end of the day. Nevertheless, looking back over the testimony of Dr. English, Dr. Brookover and Dr. Holt, it would seem that although they all were speaking of the damages of segregation to human personality, each had taken a different tack reflecting their own special area of research.

Dr. English stressed that learning and ability can be adversely affected by the sense of inferiority instilled by the very nature of segregation. Dr. Brookover maintained that antisocial behavior can be expected when the segregated school itself contradicts the notion of equal educational opportunity. And Dr. Holt emphasized that one's personality and learning ability are deeply affected by the attitude of others toward him at an early age and, if that attitude assumes his inferiority, it becomes critical when made legal.

Father John J. Kane of Notre Dame

Father Kane was qualified by his educational background, including a doctorate degree from the University of Pennsylvania in Sociology. He had been an instructor at St. Joseph's College and at the University of Notre Dame. He had done research in the field of race prejudice. Father Kane spoke of the cumulative effect of attitudinal changes through school segregation and said, "It means, as Professor Newcomb has pointed out, that one group

denies to another group status, privilege, and power and so it is borne in upon a Negro boy and girl that they are being differentiated against not merely because of skin color or physical characteristics but because there is something innately inferior or subordinate about them. So most of them begin to learn that certain avenues of vertical mobility are closed to them."

Later on, Father Kane cited the study of Ruskin which showed that the expectations of Negro youth were continually lowered causing additional damage.

The final point made by Father Kane is especially relevant to the reasoning of the majority opinion of the Supreme Court in the Plessy v. Ferguson case: the only reason that segregation leads to inferiority is because the Negroes feel that way about it. Father Kane pointed to research of his own which showed that the upper classes of Negroes in Philadelphia look down upon the migrating Negroes from the South because the newcomers had gone through segregated education. Then he said,

Now I want to point out whether or not that is true is quite beside the point because as W.I. Thomas indicated long ago, if 99 situations are real, they are real in their consequences, and this is the attitude the Negro group itself has. And of course, this is a way we form attitudes about ourselves. Not only what we think but what we know or believe other people think about us. So here again you have an indication of the inferiority that was engendered because of the segregated school system among the immigrants from the South. (46.,p.180-186)

In cross examination, though Mr. Goodell tried to shut off the full answer, Father Kane was allowed to come through with a point that has been recently confirmed by the Civil Rights Commission Report on Equality of Educational Opportunity (4.) namely that the school is a more decisive factor in the development of a deprived family than it is to the privileged family. We quote the full cross examination of Father Kane which seems to attempt to capitalize on the emphasis placed by the Catholic Church on the early childhood years:

Cross Examination

MR. GOODELL: Professor, don't you believe a home which has the child, say the first five years without any--where the school doesn't have him at all, in any case whether he is Negro or white, don't you think this has a great deal to do with the child's attitudes towards another race and acceptance, and so forth.

FATHER KANE: You are perfectly correct. As a matter of fact, the home is much more important than the school, if it's an adequate home. Now I should like to point out, if I may--

MR. GOODELL: That answers my question.

JUDGE HUXMAN: You may go ahead and give your explanation. This is an expert witness.

FATHER KANE: I should like to point out that when the home facilities are inadequate, as they are in so many cases of your poor Negro family, then the school becomes increasingly important and, in those cases probably, more important than the home since the home is exercising inadequate influence.

MR. GOODELL: I have no further questions.

JUDGE HUXMAN: It is now five minutes of adjournment time, and we perhaps could not finish another witness, and I just have an appointment I must keep. So we will suspend at this time.

The court will be in recess until tomorrow morning promptly at 9:30. (46., p.186-187)

The Second Day

On the morning of the second day of the trial, Tuesday, June 26, 1951, Judge Huxman opened court by inquiring of the attorneys for the plaintiff:

How many more of these expert witnesses do you have?

MR. CARTER: Your Honor, we at the present time only have one more expert witness to put on.

JUDGE HUXMAN: Just one more expert witness? Do you have any testimony after that, or will that conclude your case?

Then Mr. Carter explained that there would be only one further witness which was Miss Bettie Belk, (now Dr. Bettie Belk Surchet) who was on the staff of the Human Relations Workshop at the University of Kansas City summer session. Miss Belk was working on her Ph.D. in the Committee on Human Development at the University of Chicago. She had been a junior high school teacher and consultant for the YWCA on teenage programs. She was currently on the staff of the Center for Inter-Group Education and specializing in the adolescent. Miss Belk was first asked by Mr. Carter for her judgment on the Topeka practice of segregating

students through the elementary grades and then integrating them for the first time at the junior high level. Miss Belk testified as follows:

MISS BELK: I would say that by bringing children together for the first time at this age, the Board of Education is working a real hardship on both the Negro and white children, and I would like to explain why, if I may.

MR. CARTER: Please do so.

MISS BELK: I think that it is a well established fact that the years just preceding age 12, the years 10 to 12 roughly, for girls, and 11 to 13 for boys, are the years during which the important physical and physiological changes take place. The child at age 12 is trying to integrate two to five inches of standing height that he had acquired very rapidly. He is also trying to integrate very important physiological changes. In our society, girls reach puberty at about twelve-and-a-half and boys at about thirteen-and-a-half, and they are adjusting to really a new kind of body for them because of the changes which have taken place. There are social changes that take place also at this age; changes take place within the school system itself. Up until this point the child has been accustomed to a school situation in which he has related to one adult. Now he moves into what we call a departmentalized pattern. He has several teachers, he moves from one classroom to another. In other words, he has a pattern of relationships with many important adults in the school system.

Also, at this age the child moves from a peer society which has been largely made up of members of the same sex, into a heterosexual society. The seventh grade is a crucial one for girls, particularly, because they become interested in boys before boys become interested in them, and this is a very difficult time for them to live through. All in all, these are the years when children are making some of their most important life adjustments, and I would say that having been brought up in a separate system where they can only learn that Negroes and white are different, they must at this age then make an adjustment to living with someone that they have learned is different, and I think that this puts an additional adjustment on them at an age when it is very difficult for them to make it. (46., p.188-192)

In the cross examination, Mr. Goodell returned to his assumption that since there was segregation in the adult world this same segregation would carry over into the school situation and result in the Negro students being greatly outnumbered and largely shut out from activities and social contact. Miss Belk replied that this was not necessarily the case because students tend to put more emphasis upon peer culture than on parental example. She explained one situation in which they had successfully counseled

students who belonged to "the cashmere sweater set." When Miss Belk was asked how she could put herself in the place of a Negro child and understand his feelings and reactions, she offered to explain the technique of role playing. Then Mr. Goodell abruptly ended the cross-examination with these words, "if some of your assumptions are wrong, then your whole conclusions you reach are wrong, too, aren't they? Isn't that right? That's all." And the witness was excused. (46.,p.193-200)

Dr. Ernest Manheim

Having been pressured by the court not to offer other expert witnesses, Mr. Carter called Dr. Manheim as a rebuttal witness. Dr. Manheim, Professor of Sociology at the University of Kansas City (now the University of Missouri at Kansas City) was qualified as follows: Ph.D. in Sociology from the University of Leipzig and also a Ph.D. in Anthropology from the University of London. He stated his special interest to be social organization, juvenile delinquency, and social theory. When asked about his publications, Mr. Goodell objected on the grounds that this might be a repetition simply accumulative of more expert opinion. When Judge Huxman asked Mr. Carter what he proposed to rebut by the testimony of this witness, Mr. Greenberg replied:

The clerk of the school board stated that to the extent that there was a difference of library holding between the colored and the white schools, it was attributable to P.T.A. donations to the white schools. We intend to show that the maintenance of the segregated system in Topeka has caused this difference in P.T.A. and community support of the colored as against the white schools.

Mr. Goodell again objected.

After several exchanges between Judge Huxman and Mr. Carter, Dr. Manheim was allowed to testify. He continued his qualifications, stating he had published six books, including one on juvenile delinquency in Kansas City:

MR. GREENBERG: Have you ever made any studies which would enable you to form a conclusion concerning the community support which a community gives to a school?

MR. GOODDELL: We object to this as calling not for any fact, pure conjecture and guesswork and conclusion on the part of the witness.

JUDGE HUXMAN: He may answer.

DR. MANHEIM: Inasmuch as I can generalize from experience in Kansas City, I would tend to say that a school which is far from the children's residence, from their parents, is weakened in its position to supervise the conduct of the children, and the cooperation between the teachers and the parents tends to be weaker.

MR. GOODELL: We object to this for the further reason it's not rebuttal. If anything, it's part of their case in chief and, for the further reason, that is opinion--

JUDGE HUXMAN: The objection to that question will be sustained. It isn't responsive, it doesn't rebut anything that has been offered in the case.

MR. GREENBERG: Well, Your Honor, I believe that the clerk of the Board of Education did testify that the discrepancy between the white and colored schools was attributable to discrepancies in P.T.A. support. We are trying to show that--

JUDGE HUXMAN: Didn't so testify. She testified that these additional books or extra books were the result of donations by P.T.A. organizations; that is what she testified to and--

MR. GREENBERG: I hope to establish by this witness that a weakened P.T.A. is caused by having children and parents great distances from the school which the children attend.

MR. GOODELL: Object to it for the further reason it's outside the scope of the pleadings; it's not an issue raised by the pleadings as being one or any of the grounds of inequality, so it's outside the scope of the issues.

At this point Mr. Goodell's objections were upheld but Mr. Greenberg had succeeded in getting Dr. Manheim's main point into the record. (46., p.242-244)

Near the end of the trial the defense called Mr. Clarence G. Grimes to the witness stand. He stated that he was commonly known as "Cap" Grimes. He testified that he had a contract with the Board of Education for transporting of pupils to the Negro schools for thirty-five years. He mostly refuted the complaints that had been made by various Negro witnesses as to bus service.

He stated:

I say I run my bus on the scheduled time by the clock and if there is children at the corners that have to wait any length of time, they are there long before the bus should be able to get there. They know what time the bus is supposed to get to the corner.

In reply to the accusation that the children sometimes stuck their heads out the windows, Mr. Grimes testified that his windows dropped only six inches from the top. After five pages of testimony Judge Huxman intervened as follows:

...this goes to a very minor matter. In the first place, there is a schedule and, in the second place I think I would take judicial knowledge that maybe buses sometimes are a little bit late and sometimes children get there a little ahead of time. I doubt if there ever was a bus that ran exactly on the second. I don't want to restrict you in your cross examination but I wouldn't pursue that too far. (46.,p.206-210)

Final Arguments

Thirty minutes was allowed Mr. Carter to present final arguments for the plaintiffs. In his summary, Mr. Carter brought out that the Supreme Court only a month before had refused to hear a Circuit Court decision that had held unconstitutional segregation by race on trains traveling from north to south. In other words, Jim Crow laws applied only to northbound trains! While this distinction was absurd, it pointed up the fact that such segregation laws were condoned generally in the South where separation of the races was accepted as a way of life. Mr. Carter urged the court to conclude that Topeka had reached the point where integration could be peacefully brought about. He said, "the facts show that here in Topeka the time is now ripe for a decision and for this court to use its powers to strike down this (discriminatory) statute."

Mr. Carter emphasized that the statute which prohibited "discrimination" in Topeka's junior and senior high schools indicated lack of any consistent state interest in maintaining separate schools. Therefore adverse public opinion was not a factor the court needed to consider in striking down segregation in the elementary schools. (46.,p.253-256)

Then he went on to summarize the testimony in behalf of the plaintiffs:

We have introduced testimony to show that there are differences, substantial differences, between various of the white schools as contrasted to the Negro schools. We have shown that on the average in terms of teacher preparation, subject matter taught, buildings, and so forth, that on the average the school system here, as between the Negro and the white schools, there is not too much difference except for this

factor: We have shown that 45% of the white children attend schools newer than the newest colored schools and that 66% of them attend in buildings newer than the average age of the Negro school, and that on the average the insured value per classroom of the Negro school is approximately \$4,000 below that of the white school. We have also shown that in terms of books which are held by the various schools that the white schools maintain a newer supply of books; that the white schools have better books and that therefore the book holdings of the schools, as between Negro and white, is substantially different.

Now, the defendants attempt to defend this on the grounds that the P.T.A. is the cause of this difference. It is our contention that in spite of where the books come from and it has been testified that when they get into the school they belong to that particular school; that without regard to where they come from, the fact that they belong to the school and are held by the school is really the factor which makes for the difference and that has to be considered.

We have submitted testimony also to show that the separation of Negroes and whites in the elementary schools of Topeka is harmful to the development of the child, although it has been conceded that the subject-matters taught are the same, and in our definition of what is a school curriculum we have attempted to point out in the record that the school curriculum is the sum total of the child's experience from the time he leaves home to go to school until the time he returns, and therefore the fact that Negroes have to ride buses, those who do, and cannot go to the school which is within walking distance, therefore they cannot come home for hot lunches, that they are required to travel across the town merely because they are Negroes and attend a segregated school and makes it impossible for us to say that the curriculum at the segregated Negro schools are equal to those at the white schools.

We have also attempted to establish that, if anything, the maintenance of the segregated system at the first six grades and then integration at the high school, junior high school level, places an added burden upon the child because that is the time that he is meeting the problems of adolescence and attempting to develop into a man or into a woman and that with those

additional burdens upon him, we think this is an additional hardship which makes this statute, in our view, unreasonable.

Now, with that in mind we feel that we have sufficiently established that the separation of Negroes and whites in the public schools of Topeka is a denial of equal protection because of the Fourteenth Amendment, that this statute which the city or Board of Education under which it purports to operate, is unconstitutional and should be so declared by this Court, and we also contend that by virtue of the facts which we have set in the record with regard to the stigma on the Negro child because of race and color at what is considered the most crucial age of his development, that the injuries which are established here, we have put on evidence to show that these injuries are likely permanent and that they cannot be corrected merely by introducing them into the junior high school at a later age. In fact, we show that it probably by making this introduction to the junior high school on an integrated basis at the adolescent age, probably compounds the injury which has been suffered at the elementary school level and, for these reasons, we think we have established the rights of the plaintiffs for the issuance of the injunction for which we have prayed and we submit that this Court should declare this statute to be unconstitutional and order the Board of Education of Topeka to admit all persons into its schools without regard to race or color. (46.,p.256-259)

It is interesting to note that in the final argument, the defendants had the benefit of a copy of the decision from the South Carolina case which had been handed down only three days before. The court also had it but Mr. Carter and Mr. Greenberg had not yet received it. Mr. Carter had hoped to be able to quote from the dissenting opinion. The defense in South Carolina had offered its services to the State of Kansas. Mr. Paul Wilson, Assistant Attorney General, said in our interview that they probably had hastened to serve the defense and the Court in Topeka by sending transcripts. (40.)

Mr. Charles M. Brewster gave the closing argument for the defense. We are including the entire statement which includes the Topeka arguments and pertinent quotes from Plessy v. Ferguson and Judge Parker's decision handed down in South Carolina just three days earlier.

MR. BREWSTER: Your Honor, I would like to touch on one point mentioned by counsel for the plaintiffs, and that is attempting to lay some stress on the fact that the distance traveled by a pupil in attending school has some bearing upon the question before this Court. There are a number of cases to the effect that the mere fact that certain colored school children must travel farther to reach a colored school than any white child is required to travel to reach the white school, is not necessarily a deprivation of equal advantages. There are a lot of cases on that. They are collected in an annotation in A.L.R. Then, going to a United States Supreme Court decision of Gong Lum (a Chinese girl v. Rice. (56.)) In there the Court pointed out that there was no colored school within the district in which this (girl lived) no--school for other than whites...that case involved a Chinese girl being declared as ineligible to attend a white school; but they did point out in that case that there was a school in the county in which this particular school district was located where she could attend and therefore there could be no objection made on constitutional ground. The distance you travel is immaterial, and I would say that that is especially true in our situation where the entire city of Topeka constitutes a school district and where the evidence, testimony, shows that there are a number of white students who are required to walk to school a greater distance than these colored children who are furnished transportation, and we have the Kansas case in which this question was raised,... --well, I believe it's the Wright case, and there the Supreme Court pointed out that they had to attend Buchanan School which was twenty blocks farther than a white school they could attend, and our Court pointed out the fact that transportation was furnished and therefore the question of distance traveled would have no bearing on the proposition. Now that is all I want to say right now on distance traveled.

The plaintiffs in this case, of course, are by these cases attempting to have the courts abandon the separate but equal doctrine which was enunciated in the case of Plessy v. Ferguson, which appears in 163 U.S. 537. It has been mentioned by counsel for the plaintiff, and they mention or contend that the more recent decisions have whittled away the effect of that decision and, of course, in that connection, they rely on the case of Sweatt v. Painter, (63.), which is the most recent case on this point. I will come to that in just a minute. First, I would like to call attention to the fact that there have been a number of decisions to the effect that establishing separate schools for white and colored children does not violate the constitutional right to equal privileges and immunities if equal advantages are afforded for each class.

Now, defendants admit that there has been engrafted upon this separate but equal doctrine the requirement that you must afford

equal opportunity, and it's our position that under the facts stipulated to here and the evidence, that there is no real question but what we do afford equal educational opportunities to the colored folks, and we finally get down to their one point and that is that segregation in and of itself constitutes a discrimination.

School segregation statutes have been before the United States Supreme Court in a number of cases and at no time have they held that these state statutes are unconstitutional.

Now, getting down to the case of Sweatt v. Painter, we have here the opinion of the District Court of the United States for the Eastern District of South Carolina. This is the opinion of the court and, while it is not published, it is, of course, authority--Harry Briggs, Jr., et al, Plaintiffs, v. R.W. Elliott, et al, Defendants, (43.)...it was decided June 23, 1951. I would like to first call attention to this Sweatt case. In the opening paragraph of the opinion of Sweatt v. Painter, (63) the Supreme Court said this:

This case and McLaurin v. Oklahoma State Regents (57.) present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?

In other words, the Court specifically restricted that to professional and graduate education in a state university. Then the (Supreme) Court pointed out that broader issues had been urged for their consideration, but adhering to the rule that constitutional questions are made as narrow as possible, the Court says that was--is not necessary to consider, and the point I am making is that the Sweatt and the McLaurin cases do not in any way detract from the effect of Plessy v. Ferguson which is still the law.

Now, reviewing Plessy v. Ferguson, that is the case which involved the state statute providing for separate railway carriages for white and colored races, and it was a Louisiana statute, and it provided that the passengers be assigned to the coaches according to their race by the conductor, and the Court held that it did not violate--deprive a colored person of any rights under the Fourteenth Amendment to the Federal Constitution. That is the case from which stems this separate but equal doctrine which the defendants think is still applicable and which the plaintiffs, of course, are seeking to overturn.

Here is one thing the Supreme Court said in the Plessy v. Ferguson decision:

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced co-mingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.

JUDGE HUXMAN: Mr. Brewster, I don't know--

MR. BREWSTER: I am about through with that.

JUDGE HUXMAN: I was going to say that on the Circuit Court we do not care to have reading from an opinion.

Police Power to Segregate

MR. BREWSTER: I want to point out that Plessy v. Ferguson, which establishes the separate but equal doctrine and the basis upon which they go, that this regulation is a part of the police power of the state. Now, it has been repeatedly held, and that is the basis of the decision in the South Carolina case, that each state determines for itself, subject to the observance of fundamental rights and liberties guaranteed by the Federal Constitution, it shall exercise the police power and that the power to legislate with respect to safety, morals, health, and general welfare and that in no field--in no field is this right of the several states more clearly recognized than in that of public education.

Well, now, the case--the South Carolina case--bases their decision, and I won't quote a great deal from it, on the proposition that it's within the police power of the state to segregate these schools if they want to, but they must provide equal educational facilities.

Now, speaking of the Sweatt v. Painter case, which, of course it will be found the plaintiffs rely on that to a great extent, that dealt with a professional or graduate school. We are here dealing with an elementary school system which, assuming that the student goes through high school and college, this segregation exists in less than one-half of the normal educational, formal education, period. "At this level" I would like to quote just briefly from this opinion, "At this level as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture. Moreover, education at this level is not a matter of voluntary choice on the part of the student, but of compulsion by the state."

Now I would like to also call attention to the fact that in Sweatt v. Painter, the Supreme Court of the United States specifically refused to overrule Plessy v. Ferguson and, in that respect, I think it strengthens the opinion and shows that the present segregation and separation and equality is still recognized.

Now, there has been testimony to the effect that mixed schools would give a better education. But, on the other hand, it's been indicated that mixed schools might result in additional racial friction due to the fact that the colored student would be greatly outnumbered and you'd still have that inferior feeling.

I would like to, with the Court's permission, quote just a little more from this South Carolina opinion; I just got it this morning or I would have tried to give it without quoting it:

The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the state in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so, would result not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter.

In other words, continuing the theory that this is a matter of the police power, and the state has the right to make this regulation.

We submit that under the facts which are stipulated, there is established--it is established that there is no inequality of educational facilities, and, furthermore, that it is within the province of the state to determine what regulations necessary under it's police power which, of course, is to promote the peace and welfare of the people of that state, and, as far as the opinions of some sociologists or educators are concerned, we are in agreement with what the Court decided in South Carolina that it would not be within the province of a federal court or any federal court or any federal agency to adopt those views regardless of what the state might consider to be the proper regulation under the police powers.
(46.,p.260-269)

JUDGE HUXMAN: You may proceed, Mr. Goodell.

MR. GOODELL: I prefer to--if we are given authority to file briefs, I will waive argument.

JUDGE HUXMAN: You will waive your argument. All right, the plaintiff may close the argument, then.

Mr. Carter sums up for plaintiffs in his closing statement:

MR. CARTER: Your Honor, I just have a few comments to make. I remember the last point that counsel for the defendants made about the statements of sociologists and educators. I would like to point the Court's attention again to the decision in McLaurin v. the Board of Regents (57.) where what was considered in that case to be crucial to the decision was the mental attitude of the Negro and the impact of segregation upon him mentally, and therefore it was held that he was deprived of the equal protection of the laws in the segregated educational system.

Now, I have to congratulate the attorneys for the Board of Education on being much more efficient than, at least, I am, because I had hoped that we could quote from Judge Waring's dissent in South Carolina, but we were unable to get it.

JUDGE MELLOTT: We have a copy of it.

MR. CARTER: No, thank you. But, at any rate, if the Court please, I think that although these two decisions certainly, McLaurin and Sweatt, were limited, as counsel indicated, to the graduate and professional schools, it was not necessary for the Court to have made any such limitation because that would have been obvious because they applied to graduate and professional schools anyway, but the United States Supreme Court, heard a recent case that involved a question of the separate days for the use of a golf course in Miami: Negroes were given certain days of the week and whites were given the rest of the time. The matter was appealed through the Florida Supreme Court to the U.S. Supreme Court, and the question raised was whether or not the separation and giving of this separate time to Negroes and not permitting them to use the golf course without discrimination based on race or color was a denial of the equal protection clause, the golf course being municipally owned. The Supreme Court took the case, granted certiorari, reversed and remanded in the light of the McLaurin and Sweatt opinions.

Now, I think that that is clear evidence at least that the Supreme Court realized and certainly feels that the decisions and the principles which it enunciated in Sweatt and McLaurin have wide application and cannot be limited in the narrow scope of a professional school or a law school...The Supreme Court refused to overrule Plessy v. Ferguson, refused to apply it or refused to re-examine it, but I don't believe that counsel for the defendants can take too much hope in that view of the decision which was reached. The two decisions reached were to the effect that segregation, at least at the level at which the decision was handed down, was unconstitutional in the law school and in the graduate schools and I might also add that Plessy v. Ferguson applied to railroads and not to education and, although it has somehow been taken over into the educational field, it is really a railroad case. However, I think that the trend of the law is to such an extent that it is impossible to reach any other decision except that the State of Kansas has no power to order segregation. I think also that here is no such situation--this is not applicable to South Carolina; the two states are entirely different. There is not the vested interest in the maintenance of segregation in Kansas as there is in South Carolina or in Georgia. This is clear, by virtue of the fact that the state forbids it at one level even though it permits it at another, and I think that what should be applied in this case is the rule that at least if the segregation is unconstitutional, and I think that the Supreme Court cases

inevitably point to that end, that a declaration of unconstitutionality should be made in an area in which it is ripe. The time is ripe for such a decision to be reached, and I think that certainly in Kansas, with the situation as it is, that the time is now ripe for this Court to strike down the statute here in issue and to declare that the State of Kansas has no power to maintain segregation in its public school system.

JUDGE HUXMAN: Before the Court adjourns, the Court wants to compliment the parties on both sides for their fairness in the presentation of this case, the spirit of cooperation exhibited by all, to have a speedy determination of the issues in the trial of the case. I think this case was tried within less than ten days after the issues were made up and concluded, and we feel that we want to have as speedy a determination by the Court as can be handed down, giving counsel an opportunity to file briefs because, if this law is declared unconstitutional, certainly the City of Topeka is--wants to have it done as soon as possible before the beginning of the fall school term and all those matters. So we are all interested in having the matter determined just as expeditiously as it can be done, affording everybody an opportunity to prepare and file their briefs.

Now, the questions are comparatively simple to state and quite difficult to answer. There are only two questions in the case; one is, are the facilities, as I see them, are the facilities which are afforded by Topeka in its separate schools, comparable; that is one question, and the other is, granting that they are, is segregation unconstitutional notwithstanding, in light of the Fourteenth Amendment. As I get it, those are the two points in the case, is that right?

MR. CARTER: Yes, sir.

JUDGE HUXMAN: There is nothing else--

MR. GOODELL: That depends on the turn it takes. As I understand counsel, you are relying now entirely on the question of whether segregation in itself is discriminatory.

MR. CARTER: We are relying--of course we are relying on that. I think, Your Honor, that we would not need the record. I think we have our testimony in mind that has been presented.

MR. GOODELL: If that is your point, of course, then--

JUDGE HUXMAN: Mr. Goodell, I do not understand the attorneys for plaintiff waive the one point and rely on the other alone.

MR. GOODELL: I --

JUDGE HUXMAN: I understand from what they have said they practically indicate they do not lean too heavily on this discrimination in the facilities which are furnished. (46., p.268-276)

The remaining minutes of the trial were given over to the Judges' instructions for counsel.

The Decision

The three-judge Federal District Court in Topeka ruled unanimously against Oliver Brown and the other Negro plaintiffs. The court found the segregated facilities in Topeka schools to be substantially equal. Relief was denied, therefore, under the fifty-five year-old "separate but equal" principle of Plessy v. Ferguson. The Court ruled that in Topeka "...the physical facilities, the curricula, courses of study, qualifications of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable...We conclude that in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination."

Oversights in Retrospect

Dr. Buchanan and I had found no significant difference of tangible facilities except in buildings and books. As to buildings, the court probably followed partially, at least, the defense arguments that none of the Topeka buildings were too bad; that some white children attended older buildings than some Negro children and that the difference in buildings alone was not a critical inequality.

We might have argued more effectively that if a white child is obliged to attend an older school building merely because of geographical proximity this is different from a Negro child being forced to travel across the city to attend an old building because of his color. In other words, the Negro child was faced with a combination of greater distance, older buildings and the indignities of segregation.

The difference in the quality and quantity of books was a sin of omission. The State Department of Education then required a minimum of \$2.00 per year per child for library books but Topeka spent only forty-two cents. The provision of library books was left largely up to the individual P.T.A. organizations. If the Negro schools had a P.T.A. at all, it was not likely to have adequate resources so that the impoverishment of the home automatically extended into the school. Compensatory education was more than ten years in the future.

The argument of the Topeka Board of Education in several instances seemed to assume that if some white students suffered a disadvantage, this fact justified extending the disadvantage to the Negroes generally, either by direct action or lack of action. For example, since fourteen percent of the white children attended buildings older than any of the Negro schools, according to Board attorney's argument, it was considered proper for all Negro children to attend schools older than those attended by sixty-five percent of the white children. Since a few white students from outside the district had to travel considerable distances, it was considered proper for Negro students to pass near-by white schools to reach Negro schools. The failure of the Board of Education to provide adequate books for the Negro children was justified by their failure to budget adequately for books throughout the system. The defense attorney argued that the Board of Education took no responsibility for safety of the children at intersections; therefore the fact that Negro youngsters had to cross numerous intersections in going to and from school and bus stops was not the Board's concern.

At a dinner party the evening of the first day of the trial, I recall Robert Carter quoting from the Supreme Court's Shelly v. Kramer (60.) opinion:

Equal protection of the law is not achieved by indiscriminate imposition of inequality. (Emphasis added)

This same quotation appeared in the dissenting opinion issued three days before by Judge Waring in the South Carolina desegregation case. However, Mr. Carter had not at that time received a copy of either the majority or minority opinions in that case.

Perhaps a clearer example of this legal principle comes from my own experience in a Kansas barber shop some months back. There was the familiar sign on the wall stating, "We reserve the right to deny service to anyone." After getting out of the chair (which is an opportune spot for impulsive throat cutting), I casually asked the barber the meaning of the sign. He replied, "This shop is 100% American. We reserve the right to deny service to anyone regardless of nationality, race, color or creed."

No one in the Topeka trial--either witnesses or lawyers--pointed out that standardization was no guarantee of good education. It seemed to be assumed by everybody that if the course of study and textbook adoptions were the same all over the city that this in itself was a point of "equality." Apparently, the idea was not as current then as now that: "There is nothing so unequal as to treat unequals equally." Failure to adapt the curriculum to the individual child and to make adjustments for his background may lead to a very substantive inequality of opportunity.

It is obvious that a child might be subjected to a standard dose of education of a kind for which he has little background, aptitude, interest or essential need. Whether he is retarded, average or genius he might gain greater individual enhancement and social usefulness by freedom and adaptation in the curriculum rather than a uniformity which passes in the darkness as equality.

Another argument neglected at Topeka concerns the effect of segregation on the majority group. Much is said now and could have been said then about the social insensitivity, snobbery, smugness, guilt feelings (or lack of them) which accrue to the majority responsible for segregation.

At Topeka it was argued that the Negro child lost much by being isolated from representatives of ninety percent of the population. We might also have argued that the ninety percent lose by not learning to appreciate the Negro culture per se. The white majority were missing a first hand opportunity to learn by experience in a general way how to compare and understand different world cultures in an anthropological sense.

This point was mentioned a few times in the other cases but not given the attention it deserved.

At Topeka, the school survey did not show major inequalities and the Court did not find them "willful, intentional or substantial." On appeal to the Supreme Court the lawyers based their case solely on segregation per se.

Nevertheless, it probably was well that the inequalities were examined and revealed both for local consumption and as a historical precedent. "Separate and Unequal" has been more common than "Separate but Equal". Whether segregation has been de jure or de facto, the Negro child and perhaps their inner-city, white, lower-class associates are more likely to inherit the older buildings, the cast-off books and equipment and even the second-rate teachers. Judge Skelly Wright found it so in the District of Columbia in his decision of June, 1967.

Changes on the Social Scene in Topeka

At the time of the Topeka trial, we were obliged to eat in a small Negro restaurant opening onto a narrow back street because of the Negroes in our group. It is now refreshing to be able to have lunch with Charles Scott at the Jayhawk Hotel Coffee Shop or any other restaurant in the city. In the fall of 1967, Topeka passed a fair housing ordinance.

"I am a living witness to these things," said Charles Scott, speaking of the changes that have occurred. He went on to explain that the generation gap prevented his son (a graduate of Topeka High School) from understanding the progress made:

He thinks everything has been like this ever since there was a Topeka High School. Of course, when I was there we couldn't participate in any of the sports--football, basketball--now here he comes up with a football scholarship to KU this year, and they wouldn't even permit me to play football and I must admit I was a better football player than he was. I keep telling him and then he'll say, "Well, how come you didn't get a scholarship then?" We had a segregated basketball team and a lot of activities we couldn't participate in up there, our separate school parties, our separate King and Queen. Now he was runner-up for the King this year and he wanted to know why I wasn't ever runner-up for King or never was King. It hadn't been like that but he thinks it's been that way ever since the school was established. (36.)

Bussing -- For Segregation or Integration

It is interesting to note that in Topeka, prior to 1954, bussing was freely used to preserve segregation. The power structure of the white community considered that it was just to bus children to perpetuate a segregated system--with no regard for the neighborhood school idea. Today, school boards and courts are debating the exact opposite process--the bussing of students to bring about integration. And the objection is that such bussing threatens the neighborhood schools. The Negroes of Topeka protested both bussing and segregation. Now many Negroes would accept bussing as a short range plan for integration. In other words, bussing is a means to an end and becomes subordinate to the more dominant consideration of the merits, or demerits, of integration.

A Reluctant Defense for Kansas

The new Topeka Board of Education had decided not to contest the case in the Supreme Court. Even the Kansas Attorney General, Harold Fatzer, was reluctant to make an appearance.

In an interview, Paul E. Wilson, the Assistant Attorney General who defended the Kansas permissive statute in the Supreme Court, told some of the details leading up to the Supreme Court hearing of Brown v. Topeka. He said:

Because our case was first on the docket, the people from Virginia and South Carolina thought it would be distressing to have the first of these cases called for argument and have no appearance by the state. They began to bring pressures--I am not sure what particular techniques they used. I know they used to call us up nearly every day and try to induce us to get into the case. And members of the Board of Education were being pressured somehow. But then along late in November, the Supreme Court of the United States took notice of the fact that there had been no appearance for the State of Kansas and said because of the national importance of the case the Attorney General was requested to appear either in defense of the statute or concede its invalidity.

The Attorney General could not concede the invalidity of the state at this point...because there would be no basis in the law of the State or in the Federal law as it then existed to concede the invalidity of the statute. So the Attorney General was stuck with making an argument and he was still not personally disposed to getting involved in it. He brought all the files to my desk, and said, "Here take the damn thing and do what you want to with it." So this is how the case happened to involve me.

Of course, then it was very late and I spent a lot of time outside regular office hours. I did nothing, of course, for the next several days but write the original brief. I wrote it in four or five days, I think...Mr. Moore who was in the Virginia case, called me and wanted to send two young men from his firm out to assist in writing the brief, but I felt that was not appropriate. We ought to prepare our own brief and we could probably say some things that they would not have said. But any how we wrote the brief and went to Washington and appeared in the case...I suppose there has never been a case in the Supreme Court where the defense has been less spirited than that...I think the country has just been growing and it has reached the point where a policy of discrimination of this kind could no longer be tolerated. We knew it and in my thinking there was no way the Court could have decided, no justifiable way the Court could have decided to continue racial segregation in public facilities so significant as a public school...I hope the feeling was not too obvious in my case. We attempted to present the issues to the Court. (40.)

Judge Huxman Wraps It Up

During a recorded interview, Judge Walter Huxman, ex-Governor of Kansas, who presided at the Topeka trial, stated that the Topeka defense emphasized the equality of tangible facilities but that the whole case finally boiled down to the one issue, segregation per se. Then he said, "I was glad to present the question to the Supreme Court so there wouldn't be any doubt. I wanted it decided once and for all, one way or the other...The Supreme Court had ducked (the issue)...Well, I intended to put the question up there so they'd have a little difficulty getting around it." (29.)

When I quoted this statement to Thurgood Marshall, he laughed, slapped his knee and said with glee, "that's what I thought he did. That's what I thought he did."

In an interview in the Fall of 1966, Charles Scott, one of the Topeka attorneys who helped plead the case, reported further on Judge Huxman's attitude. During the post trial conference between the lawyers and Judges regarding the findings of fact and conclusion of law, the behavioral science arguments on the evils of segregation per se were under consideration. Charles Scott recalled Judge Huxman's reaction in these words:

...He just made up his mind. He was just as stubborn as you find them. He said, "I'm just going to see that this (behavioral science argument) gets in there. I don't give a damn what you say." Now, that is exactly what he said. He was a lawyer, you understand. He said, "Look, I cannot go any further because we have this Plessy v. Ferguson case staring us in the face." (36.)

"I Would Vote to Reverse It"

In our interview, Judge Huxman was willing to put something in the record he had said off the record fifteen years before:

If it had not been for that case--Plessy v. Ferguson--we would have stricken down the ordinance ourselves... by the majority of the Court...The Supreme Court had refused to overrule it completely and we thought it was their job...I said off the record after I wrote that opinion, if I were on the Supreme Court I would vote to reverse it." (29.)

Mr. Carter Prepares for the Supreme Court

Although prepared to lose the Topeka case at the District Court level, at the close of the trial Mr. Carter was jubilant about the testimony as fodder for the Supreme Court. The main points of the Topeka testimony were well summarized in one page of the Brief:

This finding is based upon uncontradicted testimony that conclusively demonstrates that racial segregation injures infant appellants in denying them the opportunity available to all other racial groups to learn to live, work and cooperate with children representative of approximately ninety percent of the population of the society in which they live. (R.216);¹ to develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population. (R.132) The testimony further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege (R.176); interferes with his motivation for learning (R.171); and instills in him a feeling of inferiority (R.169) resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society (R.165). Moreover, it was demonstrated that racial segregation, is supported by the myth of the Negro's inferiority (R.177), and where, as here, the State enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact (R.156,169,177). It was testified that because of the peculiar education system in Kansas that requires segregation only in the lower grades, there is an additional injury in that segregation occurring at an early age is greater in its impact and more permanent in its effects (R.172), even though there is a change to integrated schools at the upper levels.

That these conclusions are the consensus of social scientists is evidenced by the appendix filed herewith.² Indeed, the findings of the Court that segregation constitutes discrimination are supported on the fact of the statute itself where it states that: "...No discrimination on account of color shall be made in high schools except as provided herein." (Emphasis supplied.) (47.)

¹R. refers to page numbers in the transcript of Record as annotated in the Brief.

²See Chapter Nine and also Appendix A.

Many of the points and much of the phraseology in this summary can not only be traced back to the Kansas testimony as the references indicate but also forward to the Warren decision.

Furthermore, Mr. Carter, in the Supreme Court, was able to quote the clear logic of the Topeka decision about denying Negro children the privilege of co-mingling with representatives of ninety percent of the population:

If segregation within a school, as in the McLaurin case, is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to co-mingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades. (48., p.13)

He also quoted the heart of the social science argument which Judge Huxman had insisted on putting in the opinion:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially (ly) integrated school system. (48.,p.11)

In the interview with Judge Huxman, we reminded him of this passage and mentioned that it was the only quotation from a lower court used by Chief Justice Warren in his 1954 decision. Judge Huxman replied, "Well, of course, that is the heart of the whole controversy, and so true."

CHAPTER III

THE SOUTH CAROLINA CASE

Plaintiffs: Harry Briggs, Jr., et al, (Negroes)

Defendants: R. W. Elliott, et al, (school officials)

Counsel for Plaintiffs: A. T. Wells, Harold R. Boulware,
Spotswood W. Robinson III, Arthur Shores,
Thurgood Marshall, Robert L. Carter

Counsel for Defendants: T. C. Callison, S. E. Rogers,
Robert McC. Figg, Jr.

Expert Witnesses in Behalf of Plaintiffs:

Harold McNally	David Krech
Ellis O. Knox	Helen Trager
Kenneth B. Clark	Robert Redfield
James L. Hupp	Matthew J. Whitehead

Louis Kesselman

Judges in District Court: John J. Parker, George Bell Timmerman,
J. Waties Waring

Note: The South Carolina public school desegregation case was accepted on appeal to the U.S. Supreme Court following a decision by Judge Parker in favor of the defendants. Judge Waring wrote a dissenting opinion to the District Court decision.

SOUTH CAROLINA

A Key Decision and a Great Dissent

The South Carolina case, Briggs v. Elliott (43.) was the first of the five public school cases to be heard in a lower court and the first to reach the Supreme Court initially. The South Carolina District Court had ordered the equalizing of facilities as part of their decision handed down on June 23, 1951. The Supreme Court accepted the case for review in June, 1951, but on January 28, 1952, remanded it with a request for a progress report on the equalization process. Thus, Brown v. Board of Education of Topeka was the first appeal finally accepted and gave its name to the "Case of the Century."

Justice Black and Justice Douglas dissented on the decision to remand the South Carolina case, saying that the report requested would be "wholly irrelevant to the constitutional questions presented." At least two members of the Supreme Court were ready to consider the constitutionality of segregation per se.

As might be expected, the physical inequalities were greater in South Carolina than in Kansas. The legal status of segregation in South Carolina was absolute, whereas Kansas law was permissive and applied only to elementary schools in first class cities. A South Carolina Code read, "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race." The state Constitution required that: "Separate schools shall be provided for children of the white and colored races...and no child of either race shall ever be permitted to attend a school provided for children of the other race." (44., p.2-3)

A Surprise Move

Both the discrepancy in facilities and the inequality of segregation per se were to be emphasized for the plaintiffs by Thurgood Marshall, chief counsel. But the defense sprang a surprise immediately. They admitted physical inequalities and committed the Board of Education to corrective steps. As Thurgood Marshall explained in our recorded interview:

They came in and admitted the schools were unequal and we did not know what to do for a minute. They gained on that, but...Judge Parker, who knew he was going to be against us, let us make a record because there was no question of which way he was going to go. (32.)

The school board lawyers admitted in court that although prior to the case they had assumed the physical facilities of the separate schools were equal, they had concluded finally that they were not. Testimony in the South Carolina District Court regarding the physical facilities revealed gross inequalities between the schools for Negroes and whites. Matthew J. Whitehead, Assistant Registrar and Associate Professor of Education at Howard University, surveyed the schools. He testified that at the Rambay School for Negroes, the only source of water was an outdoor pump. Water was brought from the pump to the building in an open galvanized bucket, taken from the bucket with a dipper and poured into the children's drinking glasses. Water was brought to the all-Negro Liberty Hill school from a minister's house next door.

Sanitary facilities at Rambay and Liberty Hill Schools consisted solely of outdoor toilets constructed entirely of wood, including the seats within--the kind that the South Carolina State Department of Health described as "earth toilets." There was no running water. At the Scotts Branch School there were four toilets, two for boys and two for girls, to serve 694 students. South Carolina's Judge Parker had suggested that the question regarding physical facilities not be in dispute. (43., p.52-58)

When he spoke before the Supreme Court Mr. Marshall made his position clear: their attack was not being made on the "separate but equal" basis regarding physical facilities. The position they were taking was that these statutes were unconstitutional not only because they characteristically produced inequalities in physical facilities, but also because governmentally-imposed racial segregation in and of itself was discriminatory and a denial of equal protection of the laws. Mr. Marshall said he felt most of the cases in the past had concerned the question of whether or not there was substantial equality. He felt this tended to get them into trouble.

E. R. Crow for the Defense

The main witness called by the defense was E. R. Crow (M.A., University of South Carolina), superintendent of schools of Sumter, South Carolina. He was initially examined by Mr. Figg representing the Board of Education. In the light of his experience as a school administrator, he was asked to assume that separate schools for white and colored were not required or prohibited by law, and to assume that the school system afforded substantially equal educational facilities and opportunities: would he then state whether he considered it wise under present conditions in South Carolina, for the two races to be mixed in the same schools. He testified that it would be unwise; the existence of the feeling of separateness between the races would make it impossible to

have peaceable association in public schools.

He considered it impossible to have sufficient acceptance of the idea of mixed groups attending the same schools, or even to have public education on that basis.

He was asked if mixing the two races in the same schools at the present time in South Carolina would improve the education of both or cause it to deteriorate. Mr. Crow believed it would eliminate public school in most, if not all, communities in the state. He said there would not be community acceptance of mixed schools. When asked if there might be violent emotional reaction in the communities, he replied, "There would be, I am sure."

Mr. Crow was cross-examined by Mr. Marshall. He was asked the extent of his study on the question of racial tension. He replied he had done no formal study. He said, however, that he had observed conditions and people in South Carolina all his life. He was asked if he knew of a situation in which previously segregated schools were integrated. He did not; he drew his conclusions from what people said. He replied he was speaking primarily of white peoples' opinions but said he knew a great many Negroes. When asked if he knew anything about the Negroes' beliefs, he said he did. He stated a good many Negro school administrators had said that if Negroes remained free to choose their schools, they would prefer schools of their own race. When asked the names of these Negroes he could not remember one name. (43., p.105-120)

Before the Supreme Court, in reference to the South Carolina testimony, Mr. Marshall spoke of E. R. Crow's testimony regarding a new bond issue that was to go into effect after the hearing. More schools would be built with that bond money. Mr. Marshall said he had objected to this testimony; however, it had been admitted into the record. It was his position that any improvement of facilities in the future was irrelevant to a constitutional issue where a personal and present right was at stake. Mr. Marshall said Mr. Crow had been asked whether or not it would be "unwise" to break down segregation in South Carolina and he had proceeded to testify as an "expert." He had had six years of experience, as a superintendent of schools and prior to that was a principal of a high school in Columbia. He testified that it would be unwise to break down segregation and that he did not know if the legislature would appropriate money for school systems if segregation was eliminated. Mr. Marshall said that upon cross examination Mr. Crow was asked whether he meant if segregation was eliminated the respondents might not conform to the relief. Judge Parker had made the statement that if an order was issued in this case, it would be obeyed.

Mr. Crow had said that there was a difference between what happened in a Northern state, and what would happen in the Southern states, because they had a larger number of Negroes in the South, and South Carolina had a larger problem because the percentage of Negroes was so high. On cross-examination, he was asked to assume that in South Carolina the population was 95% white and 5% colored. He was asked if his answer would be different. He said he would make the same answer regardless.

Mr. Marshall told the Supreme Court that South Carolina could produce no scientific testimony in favor of segregation and could only say, "That it was unwise to do otherwise." (44., p.7-9)

Experts for the Plaintiffs

The expert witnesses called by the plaintiffs stood in the record unchallenged. Mr. Marshall stated he felt we had arrived at the stage where the courts gave credence to testimony of persons who are experts in their field.

A number of notable behavioral scientists had been willing to testify on the basis of their knowledge regarding the effects of segregation on the personality structure and learning ability of the Negro.

Harold McNally, Associate Professor of Education at Teacher's College, Columbia University, was examined by Mr. Carter in the District Court. He was asked if segregated Negro children could receive equal classroom instructional opportunities.

Dr. McNally said "No." He contended that it was necessary to consider the purpose of education in a democracy. The public schools were about the only institutions in the United States where children of all circumstances could come together for instruction and to know one another. One of the purposes of education in our country is to develop in each individual a meaning for the phrases: Respect for Personalities, Respect for Individualities, Respect for Others. When children were accepted for instruction on the basis of race or creed, both groups were being discriminated against in terms of good education for a democratic state. Both the white children and the Negro children were being short-changed by segregation. They were not having the opportunity to learn to value each other as persons. A basic difference in the two groups is implied by separating them. Dr. McNally held that such a difference does not exist. By separation, a stigma was implied for at least one group, a relegation to the status of second-class citizenship. (43., p.70-74)

Ellis O. Knox, Professor of Education, Howard University, was the next witness. Mr. Carter asked Dr. Knox whether, in his opinion, it was possible to give equal educational opportunities to Negro children in segregated schools. He replied, "It is my opinion that it is impossible to give equal educational opportunities to Negro children." When asked for his reason, he said segregation cannot exist without discrimination and disadvantages to the minority group. Children in Negro schools were not prepared for the same type of American citizenship as children in white schools. They should be prepared to become members of the human race, not distinct races as such. He did not believe educational conditions which centered around racial differentiations and distinctions were democratic or equal. (43.,p.75-78)

Kenneth Clark,¹ Assistant Professor of Psychology at the New York City College and Associate Director of the North Side School for Child Development in New York City, testified next. Dr. Clark reported there were many methods developed by psychologists to measure a child's sensitivity, his awareness of racial problems and the effects of segregation upon him. These were called projective techniques. He explained methods he and his wife had devised. A child was presented with two dolls identical with the exception of skin color. The child was asked which doll he like est, which doll was a "nice" doll, which one was "bad." The examiner was interested in his subject's responses and in his spontaneous remarks as he attempted to justify his choices. A child was asked which doll was like a colored child, which doll was like a white child and which doll was like him.

Another technique was the coloring method. A male child was initially presented with line drawings of various objects to determine whether he had a stable concept of color-object relationship. If he did, he was given a drawing of a little boy and told, "This little boys is like you. Color him the color that you are." In this way it was possible to ascertain the child's concept of his own color and get an indication of his anxieties and confusions regarding his color and his feelings. Another picture was presented to the little boy. He was told, "Color this little girl the color you would like little girls to be." In this way it was possible to get an indication of the child's preference in different shades of skin color. Dr. Clark testified that these methods were generally accepted as indications of the child's own sensitivity to race and the child's personal reactions to race as a problem.

¹Dr. Clark and Dr. Helen Trager had worked closely with NAACP lawyers in planning. Dr. Clark assumed major responsibility for the social science statement signed by thirty-two distinguished behavioral scientists, which went to the Supreme Court as an appendix to the Appellant's Brief. (47.)

Dr. Clark was asked if he had reached any conclusions as to the effect of racial discrimination on the personality development of a Negro child. He testified that he had concluded from the results of his own experimentation and an examination of the literature in the field, that discrimination, prejudice and segregation definitely had detrimental effects on the personality development of Negro children. The essence of this detrimental effect was confusion in the child's concept of his own self esteem--basic feelings of inferiority, conflict, confusion in his self-image, resentment, hostility towards himself, hostility towards whites, intensification of a desire to resolve his basic conflict by escaping or withdrawing at times.

Dr. Clark pointed out that other social scientists generally supported his conclusions. A study by Deutscher and Chein found that ninety per cent of a representative sample of social psychologists and social scientists agreed that segregation had detrimental effects on the personalities of individuals who were victims of segregation. Furthermore, the Deutscher and Chein research revealed that eighty-two per cent of these social scientists believed that the consequences of belonging to a segregating group were also detrimental. The pattern of this detriment was different in the latter. Here it was the feeling of the social scientists that the basic personality problems were guilt feeling and confusion concerning basic moral ideology and a conflict set up in the child who belonged to the segregating group. He had the same people teaching him democracy, brotherhood and love of his fellow man, and at the same time condoning or advocating segregation and discrimination. Most of these social scientists believed that this causes in the personalities of these children a fundamental confusion in the moral spheres of their lives.

Dr. Clark had testified for the plaintiffs in the Briggs case. He said:

The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

Dr. Clark said that he felt it was the kind of injury which would last as long as the situation lasted, changing only in form and in the way it manifested itself. (43.,p.82-96)

James L. Hupp, Dean of Students and Professor of Education and Psychology at the Wesleyan College of West Virginia, was next on the stand. Dean Hupp was asked if a Negro child educated under segregated circumstances would be able to secure equal educational opportunities. His answer was "No." He said in his opinion when Negro children and white children were educationally separated they did not get a clear picture of each other's race. Their education was distorted and not a balanced, all-around education.

When asked what he conceived to be the function of education, he emphasized the development of good citizens, citizens able to function efficiently in a democracy. It was the business of education to help children face the tasks they met as growing, developing persons. In growing up, a child matured physically, socially, intellectually and emotionally. Every one of these phases of development must be given attention by educators; they were inter-related and inter-dependent. If one phase was not taken care of as well as it should be, all of the others were injured to some extent. Social development was a very important phase. Children did not achieve proper social development in segregated schools.

Dean Hupp testified that the college where he taught had excluded Negroes, then admitted them. Negro students had been on campus for the past two years with no evidence of emotional tension. The student body had welcomed the Negroes and elected one to the student government. (43.,p.97-101)

Louis Kesselman, Associate Professor of Political Science, University of Louisville, was asked if he felt segregated public schools would affect individuals adversely. He listed a number of results which worked against good citizenship. Segregation of white and Negro students prevented them from gaining an understanding of the needs and interests of both groups. Segregation bred suspicion and distrust in the absence of knowledge of the other groups. Where segregation was enforced by law, it might even breed distrust to the point of conflict. He pointed out that when a community was faced with problems common to every community, it needed the combined efforts of all citizens. Where segregation existed as a pattern in education, it made that cooperation more difficult. Various studies indicated that people who were low in literacy and low in experience with other groups were not as likely to vote. (43.,p.101-104)

David Krech testified for the plaintiffs in the South Carolina case. While on leave from the University of California he was Visiting Professor of Social Psychology at Harvard University.

He was asked to assume that segregated schools were required by law. Had he formed any opinions as to what effect this situation would have on the Negro child? He maintained that legal segregation of education was probably the single most important factor which caused harmful effects on the emotional, physical and financial status of the Negro. He said it resulted in a harmful effect on the white child as well. When asked to elaborate on this, he replied that legal segregation involved a legal definition of an individual and a statement of some of his rights in relation to race. This factor promoted, encouraged and enhanced racial prejudice and racial segregation of all kinds. The reason for that, psychologically, was primarily this: no one, unless he was mentally diseased, could long maintain any attitude for belief unless there were some objective supports for that belief. We believe there are trees. We would not continue to believe there were trees if we never saw a tree. Legal separation, because it was legal, because it was obvious to everyone, gave "environmental support" for the belief that Negroes were in some way different from and inferior to white people. That in turn supported and strengthened beliefs of racial differences, of racial inferiority. Legal segregation was both a result and in turn a cause of continued racial prejudice. Racial prejudice had harmful effects on the personality of an individual, on his ability to earn a livelihood, even on his opportunity to receive adequate medical attention. Dr. Krech said he looked at legal segregation as an extremely important contributing factor. He also reported that segregation of the educational system started the process of differentiating the Negro from the white at a most crucial age. Children, when they are beginning to form their views of the world and perceptions of people, were immediately put into the situation which demanded of them, legally, that they see Negroes as different beings from whites.

Dr. Krech was asked if injuries from legal segregation were enduring or temporary. He maintained that a child, who had for ten or twelve years lived in a community where legal segregation was practiced and where beliefs and attitudes supported racial discrimination, would probably never recover from whatever harmful effects prejudice had inflicted.

Inferior Because We Make Him So

Dr. Krech was asked to assume that segregated public schools, which the Negroes attended, were inferior to white schools and asked if education in that situation would have an adverse effect on the Negro child. He replied, "Very definitely." An inadequate education reflected itself in a lowered IQ, in lowered ability to cope with the problems of life. He said:

I might point out that I do not hold with some people who suggest the white man, who is prejudiced against the Negro, has no cause to be so prejudiced. I would say that most white people have cause to be so prejudiced against the Negro, because the Negro in most cases is indeed inferior to the white man, because the white man has made him so through the practice of legal segregation.

He maintained no psychologist would say there was a biological, fundamental difference between the two groups of people, but as a consequence of inadequate education whites built into the Negro the very intellectual and personality characteristics which were used to justify prejudice. (43.,p.120-135)

Helen Trager Testifies

Mrs. Helen Trager, a teacher and curricula consultant at Vassar College in Poughkeepsie, New York, was called to the stand. Mrs. Trager was asked if she had any actual and practical experience in determining Negro school children's personality problems caused by racial discrimination and segregation. She replied that she had taught Negro and white children and was the teacher of teachers from the North and South who taught Negro and white children. She was the director of a study in Philadelphia public schools involving both Negro and white pupils. She was asked if any conclusions had been reached on the question of personality problems caused by racial discrimination and segregation. She said in order to determine what kinds of program would help children develop democratic behavior, get along with other children and develop self-respect, she and her colleagues were interested in the children's feelings about themselves and other people. Tests were given to determine these feelings. She pointed out where the Negro and white children evidenced different feelings.

At age five all the children were aware of racial differences. White children talked freely about race and race differences, whereas Negro children showed obvious discomfort and avoidance. Both saw being Negro as a disadvantage. The white children saw the white as being the preferred group, wanted to be white, and felt that other children preferred to be white. Negro children at the same time said Negro children liked to be Negro but would like to be white. *Underlying this was a* conflict and inability to accept one's own group and yet the psychological need to accept what one was.

Interestingly enough, both Negro and white children perceived the Negro group as meaning the same thing, and children from ages

five to eight perceived Negro as meaning you were not liked by people, that you would not be asked to play, that you would not be allowed to do things that other children could do.

Both groups had fears and misconceptions about each other, frequently the same fears and misconceptions. They had incorrect interpretations regarding what made one white and what made one Negro and gave frightening and inaccurate explanations of race. Some white and also some Negro children saw white as being the ultimate evolution in a kind of baking process, where one came out white eventually and saw brown people as something not quite finished. Negro children, unlike the white children, showed a tendency to expect rejection. This expectation of rejection increased sharply from five to eight years of age. In growing up, they were learning to expect not to be accepted. Negro children from five to eight years of age began to rationalize their not being accepted with phony explanations. At five, a Negro child would indicate that he expected Negroes not to be accepted and would give as the reasons, "Because he isn't white" or "Because he is black." At eight, the explanations were evasive, avoidant: "Because he can't play the way they can" or "Because he doesn't live near them." Mrs. Trager said the study revealed that basic emotional needs of all human beings for self-respect and acceptance were frustrated in Negro children.

Mrs. Trager was asked if she felt the conclusions indicated actual injury to the personality of the individual. She said they unquestionably did. The problems children had in study, in getting along with each other, in accepting themselves, were related to their own image of themselves and their feelings about their group. A child who expected to be rejected, who saw his group held in low esteem, was not going to function well. He was not going to be a fully developed child; he would be withdrawn or aggressive in order to win the acceptance he did not get.

When asked if this interfered with his education, Mrs. Trager replied:

I think that any psychologist and certainly any educator would agree that blocks to learning are frequently psychological blocks, and one of the great or common problems is self-doubt in human beings, and where there is self-doubt, energy is wasted in that direction and learning is not very effective. We spend a tremendous amount of time... trying to understand why children behave as they do and what emotional problems they have, and only as we understand their emotional problems can we help them to learn.

When asked if injuries could be remedied in a segregated school, she said she did not believe so. She agreed with Dr. Krech that segregation became the rationalization for prejudice. To the children who were legally segregated in schools, this separation, this difference of status, was inevitable. Under those circumstances the children could not overcome the feelings of inadequacy they had because they were separated from others. (43.,p.136-139)

Mrs. Trager was cross-examined by Mr. Figg. She was asked if she was familiar with a book by Gunnar Myrdal, The American Dilemma. Mr. Figg quoted, "Some Negroes, however, prefer the segregated school, even in the North, when the mixed school involves humiliation for Negro students and discrimination against Negro teachers." Asked if she agreed with this statement she replied, "Yes," and said further that minority groups frequently self-segregate themselves by choice because of the unequal status they have in society. However, that is not a solution, she reminded him.

When asked if she conceded that emotional conflicts, frustrations and aggressions did arise between the white and colored races where they lived together in the same area in great numbers, she replied, "Yes". Again Mr. Figg quoted The American Dilemma: "DuBois has expressed this point of view succinctly, 'Theoretically the Negro needs neither segregated nor mixed schools.'"

When asked if she agreed, Mrs. Trager said she did not. When asked if she agreed that what the Negro needs is education, Mrs. Trager replied affirmatively.

Again Mr. Figg quoted, "What he must remember is that there is no magic either in mixed schools or in segregated schools." With this, Mrs. Trager agreed one hundred per cent. Mr. Figg asked her additional questions and concluded with the quotation, "Sympathy, knowledge, and truth outweigh all that the mixed schools can offer." Do you agree with that?"

Mrs. Trager replied that she did not and explained that learning to live together and to accept other groups must be made possible for children in life situations. School was a life situation. It was essential that children have the experience of meeting with, working with others who were different from themselves. In one of her testing situations, both Negro and white children were asked to play with Negro and white dolls, to dress them to choose houses for them, to tell what kind of work they did and where they were going. The white children who tended to give the worst clothes to the Negro doll and the good clothes to the white doll, who gave the worst house to the Negro doll because that was where the doll would live, who gave the lowest type of work to the Negro doll, were also the children who had the keenest hostility toward Negro people. (43.,p.143-146)

Mr. Carter questioned Mrs. Trager further in redirect examination. He asked if she had any experience in attempting to correct the injuries which she described. She replied that she had. He asked what conclusion she had reached regarding their correction in public schools. She said that misconceptions children had, fears, self-hate, feelings of inadequacy, could be corrected only in situations which did not perpetuate those fears, misconceptions and feelings of inadequacy. Mixed schools gave us the base in which to function, the setting, if not the factors that were needs for the re-education of children. When that mixture was absent it was not possible to re-educate children along the lines of feelings and behavior toward people. She was asked by the Judge whether she considered home a base. She said that the home could help a great deal in the re-education of children, but the resolution of their emotional conflicts was frequently possible in the school and was not always possible in the home. This was true whether it was an emotional conflict because of sibling rivalry, a feeling of rejection on the part of a child by the mother, or a feeling of inadequacy because of being Negro. The Judge asked if these conditions arose first in the home or in the school. She said they arose in the home because the child's first years were spent in the home. The place, however, where education can and must take place if hostility and fear are to be diminished is in the school.

She was asked if the injuries could ever be corrected in a segregated school and she replied, she thought not. Segregation was a perpetuator of prejudice. It stigmatized children who were segregated. The enforcement had an effect on personality and one's evaluation of self, which was interrelated to one's evaluation of one's group. (43.,p.146-148)

Robert Redfield's Texas Testimony

Doctor Robert Redfield was enroute to the South Carolina trial. Due to weather, his flight did not arrive in time for him to testify; so his testimony from the case of Sweatt v. Painter, (the University of Texas segregation case (62.) was copied into the record. (43.,p.156-175) Dr. Redfield was Professor of Anthropology and Chairman of the University of Chicago Anthropology Department. When he testified in Sweatt v. Painter, Mr. Marshall had asked Dr. Redfield what the acceptable purposes of education were. Dr. Redfield said that the main purposes of education were to develop in every citizen, in accordance with his natural capacities, his fullest intellectual and moral qualities, and promote effective participation in the duties of citizenship.

He was asked if there were recognizable differences in the intellectual capacity of Negro and white students. Dr. Redfield

replied that those who had been working in this field began with a rather general presumption that inherent differences in intellectual ability did exist between Negroes and whites. They had slowly and convincingly been compelled to come to the opposite conclusion. There were probably no significant differences in ability to learn. They had been brought to that conclusion, he said, by a series of studies which had this general character: samples from the two groups, Negroes and whites, were placed in as nearly identical situations as possible, and given limited tasks to perform, tasks which were understood to be relevant to the capacity to learn. These samples were measured against each other as to the degree and kind of success in performing the tasks. The general conclusion was that differences in intellectual capacity or inability to learn had not been shown to exist between Negroes and whites. The results made it very probable that if such differences were later shown to exist they would not prove to be significant for any educational policy or practice.

He was asked, given a similar learning situation, what differences were there between the accomplishment of a white and Negro student. He responded one does as well as the other on the average.

Dr. Redfield was asked his opinion of the effect of segregated education, (1) on the student, (2) on the school, (3) on the community in general. He said that for several reasons segregation had effects on the student which were unfavorable to the full realizations of the objectives of education. It prevented him from fully understanding the nature and capacity of the group from which he was segregated. His comment applied to whites and Negroes. One of the objectives of education was the full and sympathetic understanding of the principal groups in the system in which the individual was to function as a citizen. Segregation had an unfortunate effect on the student. This, in turn, had an unfortunate effect on the general community. It intensified suspicion and distrust between Negroes and whites. The school room situation provided less than the complete and natural representation of the full community. Education went forward more favorably if the community of student, scholar and teacher was fairly representative of the total community. The development of suspicion and distrust which the segregated situation encouraged was correspondingly unfavorable in the schools. Segregation affected the general welfare of the total community unfavorably. It accentuated imagined differences between Negroes and whites. False assumptions regarding the existence of differences were given an appearance of reality by the formal act of physical separation. As segregation was against the will of the segregated, it produced a situation conducive to the increase of ill feeling and conflict.

When asked about his personal experiences concerning the admission of minority groups to previously segregated educational facilities, Dr. Redfield said his experiences had been largely with the University of Chicago and its related educational institutions. Segregation was not practiced in the educational facilities of the University, ~~neither~~ in the classroom, the dormitory, eating facilities, nor anywhere else.

The community in which the University lies in one ~~is~~ which segregation was practiced by custom, not law. Integration of the community around the University had benefited education. He said he knew of no ill effects. He told of the laboratory school of the University which Negroes had been discouraged to attend for a great many years. When it was made apparent they would be welcome, they began to come. There was opposition from a minority of the academic community. Many evil consequences were conjectured. None of those consequences took place; there was an improvement in the community for there was then a representation of national society. Relations between the white and the Negro groups were improved. (43.,p.156-165)

Mr. Price Daniel, then Attorney General of Texas, cross-examined the witness.¹ Dr. Redfield was asked if in a community where segregation had been long enforced, gradual change was not the only way the ultimate goal could be properly obtained. He replied, "I think that all change should not come on any more rapidly than is consistent with the general welfare." The questioning continued:

MR. DANIEL: In other words, you will agree with the other eminent educators in your field, the fields in which you are acquainted, that it is impossible to force the abolition of segregation upon a community that has had it for a long number of years, in successfully obtaining the results that are best?

DR. REDFIELD: No, I don't agree to that.

MR. DANIEL: Do you think the laws should be changed tomorrow?

DR. REDFIELD: I think that segregation is a matter of legal regulation. Such a law can be changed quickly.

MR. DANIEL: Do you think it has anything to do with the social standing in the community?

¹As noted above, Dr. Redfield's testimony from Sweatt v. Painter, (62.) Texas University case, was copied into the record of Briggs v. Elliott.

DR. REDFIELD: Segregation in itself is a matter of law, and that law can be changed at once, but if you mean the attitude of the people with respect to keeping away from people of another race, then perhaps I have another answer.

MR. DANIEL: I am speaking about desired results for the individual and the community, and for the state.

DR. REDFIELD: Will you ask your question over again?

MR. DANIEL: With respect to the individual, the state, the community and the schools, do you, in your opinion, believe that an immediate change in segregation will accomplish the results that you have testified as being best in a community where segregation has been enforced and recognized for many years?

DR. REDFIELD: I think in every community there is some segregation that can be changed at once, and the area of higher education is the most favorable for making the change.

MR. DANIEL: You admit there are areas in which the change can not be made at once?

DR. REDFIELD: You mean in 24 hours, with more harm than good resulting?

MR. DANIEL: Yes.

DR. REDFIELD: Certainly.

MR. DANIEL: Or within a year?

DR. REDFIELD: May I state my opinion again?

MR. DANIEL: Instead of 24 hours, we will say within a year or two.

DR. REDFIELD: I will put it this way. I think this will satisfy you on that as covering my opinion. I think the steps by which, and the rapidity with which segregation in education can be removed with the benefits to the public welfare will vary with the circumstances.

MR. DANIEL: In other words, the circumstances of the community and how long there has been segregation will have a bearing on it?

DR. REDFIELD: Yes, sir.

MR. DANIEL: In other words, do you recognize or agree with the school of thought that, regardless of the ultimate objective concerning segregation, that if it is to be changed in southern communities where it has been in effect for many years, if it is to be changed successfully, it must be done over a long period of time, as the people in that community change their ideas on the matter?

DR. REDFIELD: That contention, I do not think will be my opinion on the matter scientifically.

MR. DANIEL: Does that represent, scientifically, a school of thought, in your science, in the matter?

DR. REDFIELD: There are some that feel that way.

A Modern Carpet Bagger?

MR. DANIEL: Yes, sir. You are acquainted with the history of the carpet bagger days in the Civil War?

DR. REDFIELD: I feel better acquainted with it today, sir, than anybody.

MR. DANIEL: Dr. Redfield, let me get you clearly on that. You are not talking about your own trip down here, are you, to Texas? You say you are acquainted with it today?

DR. REDFIELD: It just drifted into my mind.

MR. DANIEL: You recall the carpet baggers, where they packed up and came down here from out of the state. You didn't mean to be talking about your trip down here, did you? You are the only witness from out of the state that we have had on, so far. You didn't mean to be talking about the trip down here?

DR. REDFIELD: I am afraid the idea has come into my mind.

MR. DANIEL: That wasn't what you referred to?

DR. REDFIELD: It is in my mind now.

MR. DANIEL: Are you acquainted with the history of the carpet bagger days in the South?

DR. REDFIELD: In a very general way.

MR. DANIEL: You know, do you know, from that history, that the attempt to force the abolition of segregation in the South just didn't work?

DR. REDFIELD: Yes, of course.

MR. DANIEL: Do you feel like the social attitudes and beliefs of the people in that day had some bearing on whether or not it would work?

DR. REDFIELD: Oh, yes.

MR. DANIEL: Of both races?

DR. REDFIELD: Oh, yes. (43.,p.166-167; 62.)

Miscegenation?

Dr. Redfield was asked if he realized there should be some limit to this theory regarding the abolition of segregation. Was social commingling necessary? He replied that if social commingling meant communication of students and professor--yes. Was that as far as he thought it was necessary to have commingling of the races in order to obtain the objectives he thought were necessary for public education? Dr. Redfield said that he had answered that question and the court agreed, but the attorney had not reached his point:

MR. DANIEL: I am not quite satisfied, I don't want to ask an embarrassing question, but yet, --you have testified--I really want to know--you have testified that you believe certain segregation must be done away with in order to accomplish the best for the school and the community?

DR. REDFIELD: If you are thinking about intermarriage--if that is in your mind, I would be delighted to answer.

The lawyer replied that his mind had not gotten quite that far on the subject. (43.,p.170;62.)

Mr. Daniel then asked Dr. Redfield to give his opinion of a well-known reference book:

MR. DANIEL: Doctor, are you acquainted with the Encyclopedia Britannica, the publication by that name?

DR. REDFIELD: I have a set. I don't look at it very often.

MR. DANIEL: You are from the University of Chicago?

DR. REDFIELD: Yes.

MR. DANIEL: Is that publication now published under the auspices of that University?

DR. REDFIELD: Yes, sir; and it badly needs rewriting.

MR. DANIEL: It is published under the auspices of your University?

DR. REDFIELD: Yes.

MR. DANIEL: Have you read the article therein on education, and segregation of the races in American Schools?

DR. REDFIELD: If I have, I don't remember it.

MR. DANIEL: You don't remember it. Have you written any articles for the Encyclopedia Britannica?

DR. REDFIELD: No, we are just beginning a revision of anthropological articles, and it seems there has to be a very drastic change.

MR. DANIEL: Do you know who wrote the articles in the Encyclopedia Britannica on the subject of higher education for Negroes, and segregation?

DR. REDFIELD: I don't remember such articles.

MR. DANIEL: Do you recognize the Encyclopedia Britannica and the articles on such subjects as an authority in the field?

DR. REDFIELD: No, I do not.

MR. DANIEL: You do not?

DR. REDFIELD: No, sir.

MR. DANIEL: Do you know of some scientists in your field who do recognize those articles?

MR. DURHAM: We object to that as being irrelevant and immaterial, what somebody else recognizes.

THE COURT: That would be his--perhaps not what they recognize, but what they have said about it.

DR. REDFIELD: I think I could answer that question, and do more justice to the meaning than just with a yes or no answer.

MR. DANIEL: Go right ahead.

DR. REDFIELD: All of the articles you have mentioned in that publication are of extremely uneven merit, so that the men with whom I have talked who have studied it--I haven't studied it--tell me that certain articles are extremely good and other articles are extremely bad. That is about the best I can answer...

MR. DANIEL: Do you know any scientists who have written books of articles on the American Negro, on segregation, who do not share your ideas?

DR. REDFIELD: Many of the scientists that study this problem have not written or expressed themselves on the education results of segregation. They are agreed, all that I have mentioned, and a great many more on the conclusions which I gave in direct testimony in the first of my remarks with regard to the probability, or the existence of inherent differences in educational capacity, but the application of the conclusion to the school situation concerns a very much smaller group of people, because the group of people concerned with that are educational administrators and the like and many of those people whose names I have given you are not educational administrators.(43.,p.171-173; 62.)

On recross-examination of Dr. Redfield, Mr. Daniel returned to questions about the necessity for gauging community attitudes:

MR. DANIEL: Dr. Redfield, in determining the question of changing the laws and regulations in a community concerning segregation, in your opinion, should the community, should the State consider the community attitudes of both of the races concerning the matter?

DR. REDFIELD: I think so. You understand that the attitudes of the community are complex. Attitudes in the State of Illinois and the State of Texas, I take it, are, one; some white people don't want to be near Negroes under certain conditions and those same white people want equality of education and other opportunities in America, and there are both kinds of attitudes in making the change.

MR. DANIEL: Would you consider the attitude of some Negroes that would rather have segregation themselves, in determining the educational situation?

DR. REDFIELD: Yes, and you have to consider that Texans, with other Americans, share the view that equality of opportunity is due every man in this country, and they are struggling, as are all of us, to reconcile those attitudes.

MR. DANIEL: You would take those two into consideration before you would arrive at what is best to be done for the individual and the community?

DR. REDFIELD: Always understanding both kinds of attitudes. (43.,p.174-175; 62.)

The Decision and a Dissent

The decision of the United States District Court was filed June 23, 1951. The majority opinion was written by Judge Parker. He concluded that if equal facilities were offered, segregation of the races in the public schools was not of itself violative of the Fourteenth Amendment. This conclusion was supported by overwhelming authority which the judges did not feel at liberty to disregard on the basis of theories advanced by a few educators and sociologists. They could not ignore the unreversed decisions of the Supreme Court of the United States which were squarely in point and conclusive regarding the question. Seventeen states and the Congress of the United States had for more than three quarters of a century required segregation of the races in public school. This received approval of the leading appellate courts of the country and the unanimous approval of the Supreme Court of the United States. It was late now to say segregation was violative of fundamental constitutional rights. Any change was a matter for the legislature, not for the courts. (43.,p.176-190)

J. Waties Waring filed a dissenting opinion in the South Carolina court. Judge Waring said that it certainly appeared that large expenses had been incurred in the institution of the case and great efforts expended in gathering data, making a study of the issues involved, interviewing and bringing in numerous witnesses some of whom were among the foremost scientists in America. The sixty-six plaintiffs had shown courage in presenting this important Constitutional question in the face of a long established way of life which South Carolina practiced as a result of the institution of human slavery.

If a court could refuse to hear basic issues in a case of this importance by merely admitting some buildings and toilet facilities were unequal and may be remedied by the spending of

a few dollars, then, people in severe predicaments had no forum in which to air their wrongs. If this evasion was adopted, the plaintiffs may be bringing suits for their grandchildren. The plaintiffs, Judge Waring declared, were entitled to their rights now, not in the future. The rights were theirs under the Constitution and laws of America and must not be denied them by a false doctrine of "separate but equal." The Court must meet the issues simply, factually, and without fear and evasion.

Judge Waring maintained that Briggs v. Elliott, a case relating to lower school education, was based upon exactly the same reasoning followed in the Sweatt and McLaurin decisions for higher education. And he quoted from another Supreme Court decision, Shelley v. Kramer (60.), to make his point:

Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Judge Waring eloquently attacked the principle of "white supremacy" in his dissent:

The whole discussion of race and ancestry has been intermingled with sophistry and prejudice. What possible definition can be found for the so-called white race, Negro race or other races. Who is to decide and what is the test? For years, there was much talk of blood and taint of blood. Science tells us that there are but four kinds of blood: A, B, AB and O, and these are found in Europeans, Asiatics, Africans, Americans and others. And so we need not further consider the irresponsible and baseless references to preservation of "Causasian blood." So then, what test are we going to use in opening our school doors and labeling them "white" and "Negro"? The law of South Carolina considers a person of one-eighth African ancestry to be a Negro. Why this proportion? Is it based upon any reason: anthropological, historical or ethical? And how are the trustees to know who are "whites" and who are "Negroes"? If it is dangerous and evil for a white child to be associated with another child, one of whose great-grandparents was of African descent, is it not equally dangerous for one with a one-sixteenth percentage? And if the State has decided that there is danger on contact between the whites and Negroes, isn't it requisite and proper that the State furnish a series of schools one for each of these percentages? If the idea is perfect racial equality in education systems, why should children of pure African descent be brought in contact with children of one-half, one-fourth, or

one-eighth such ancestry? To ask these questions is sufficient answer to them. The whole thing is unreasonable, unscientific and based upon unadulterated prejudice. We see the results of all of this warped thinking in the poor under-privileged frightened attitude of so many of the Negroes in the southern states; and in the sadistic insistence of the "white supremacists" in declaring that their will must be imposed irrespective of rights of other citizens. This claim of "white supremacy", while fantastic and without foundation, is really believed by them for we have had repeated declarations from leading politicians and governors of this state and other states declaring that "white supremacy" will be endangered by the abolition of segregation. There are present threats, including those of the present Governor of this state, going to the extent of saying that all public education may be abandoned if the courts should grant true equality in educational facilities. (43.,p.197-198)

Judge Waring summarized the arguments and logic of the social science witnesses who testified in South Carolina:

The Plaintiffs brought many witnesses, some of them of national reputation in various educational fields. It is unnecessary for me to review or analyze their testimony. But they who had made studies of education and its effect upon children, starting with the lowest grades and studying them up through and into high school, unequivocally testified that aside from inequality in housing appliances and equipment, the mere fact of segregation, itself, had a deleterious and warping effect upon the minds of children. These witnesses testified as to their study and researches and their actual tests with children of varying ages and they showed that the humiliation and disgrace of being set aside and segregated as unfit to associate with others of different color had an evil and ineradicable effect upon the mental processes of our young which would remain with them and deform their view on life until and throughout their maturity. This applies to white as well as Negro children. These witnesses testified from actual study and tests in various parts of the country including tests in the actual Clarendon School district under consideration. They showed beyond a doubt that the evils of segregation and color prejudice come from early training. And from their testimony as well as from common experience and knowledge and from our own reasoning, we must unavoidably

come to the conclusion that racial prejudice is something that is acquired and that that acquiring is in early childhood. When do we get our first ideas of religion, nationality and the other basic ideologies? The vast number of individuals follow religious and political groups because of their childhood training. And it is difficult and nearly impossible to change and eradicate these early prejudices, however strong may be the appeal to reason. There is absolutely no reasonable explanation for racial prejudice. It is all caused by unreasoning emotional reactions and these are gained in early childhood. Let the little child's mind be poisoned by prejudice of this kind and it is practically impossible to ever remove these impressions however many years he may have of teaching by philosophers, religious leaders or patriotic citizens. If segregation is wrong then the place to stop it is in the first grade and not in graduate colleges.

From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guides, posts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced by the State of South Carolina must go and must go now. (43., p.206-208)
Segregation is per se inequality

As might be expected, this dissent made Judge Waring very unpopular in South Carolina. After he and his family suffered numerous threats, he left the state.

CHAPTER IV

THE VIRGINIA CASE

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Plaintiffs: Davis, et al. (Negroes)

Defendants: County School Board of Prince Edward County

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Counsel for Plaintiffs: Oliver W. Hill, Spottswood W. Robinson III,
Robert L. Carter

Counsel for Defendants: T. Justin Moore, Archibald G. Robertson,
T. Justin Moore, Jr.

Counsel for State of Virginia: J. Lindsay Almond, Attorney General;
Henry Wickham, Assistant Attorney General

- - - - -

Expert Witnesses for Plaintiffs:

Thomas Howard Henderson
John J. Brooks
M. Brewster Smith
Isidor Chein

Kenneth B. Clark
Mamie P. Clark
Howard W. English
Alfred McClung Lee

Expert Witnesses for Defendants

Henry E. Garrett
William H. Kelly

Lindley Stiles
John N. Buck

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Note: The Virginia public school desegregation case was accepted on appeal to the U.S. Supreme Court following a decision by the District Court which found no harm to either race by segregation and which ordered facilities in Negro schools be made equal to those in white schools.

SOCIAL CUSTOMS IN VIRGINIA

Defense Experts Help the Plaintiffs

Both Main Arguments Unique

The Virginia case, number three on the docket, is known as Davis v. School Board of Prince Edward County (51.). The same two main issues which emerged in the Kansas and South Carolina cases dominated the arguments in Virginia, namely, the question of equal facilities and the possible evils of segregation per se.

Here, however, the Board of Education did not argue that the Negro schools were substantially equal but that "mammoth efforts" were being made to make them so. (50.)

The defense of the principle of segregation per se also took a different turn, with the defense calling its own expert witnesses. But the tactic seemed to backfire. Under cross-examination, all but one of the experts called by the defense testified that there was harm or the possibility of harm in segregation.

Making Facilities Equal?

Arguing the issue of facilities before the Supreme Court, T. Justin Moore, defense attorney, gave the reasoning behind the school board stand. The state of Virginia had what they called a "Battle Fund" of 60 million dollars. Of that amount, ten million dollars had (already) been allocated for the Negroes and eighteen million for the whites. Mr. Moore declared the Negroes were getting much more than their proportional share. Virginia also had a Literary Fund from which forty-eight million dollars had been loaned to whites and sixteen-and-a-half million dollars had been loaned to Negroes. Here too, he said, the Negroes were benefiting more in proportion to their population. The Board of Education had adopted a four-year-plan which included 168 projects for whites and 73 projects for Negroes, 189 million dollars was allotted for the whites and 74.5 million dollars was for Negroes.

Just think what that means in taxation and in burdens to the people of Virginia in carrying out this program, with 74.5 million dollars for Negroes. In other words, they are sharing in all this huge program in a ratio of about two to one, although their ratio in the state is only about 22 percent.

Mr. Moore declared that the people of Virginia were fully committed to providing the Negro child with an education equal to that of the white child. (52.,p.49)

A different picture was presented during the Virginia trial. Thomas Howard Henderson, Dean of the College and Professor of Education at the University of Virginia, testified concerning a survey he conducted of the Prince Edward County high schools: the Moton High School for Negro children and the Farmville and Worsham High Schools for white children. In answer to questions about what the examination disclosed, Dr. Henderson said:

...There is a gross difference in the physical plants. In the first place, in the physical appearance and the architectural arrangement, there is a great difference in favor of the white schools. In the type of construction there is a great difference because at the Moton School there are several outdoor buildings that are tarpaper buildings. In the important factor that they are all housed at one roof at Farmville, but not at Moton, where you have to go outdoors in inclement weather from classroom to classroom. Considerable differences in the site; the Farmville School occupies an entire block in a rather quiet and peaceful neighborhood. The Moton School is in an angle at the intersection of two highways, I believe; one is certainly a highway... Quite a difference, then, in construction, quite a difference in the fact that one is housed under one roof and that the other you would have to go from room to room, pass outdoors, and quite a difference in the architectural arrangement. (51.,p.82)

Dr. Henderson also presented facts on the differences in valuation of equipment at the white and Negro schools:

We will just discuss the year 1950-51; at Moton, the valuation of the property...on the scientific equipment, not including agricultural, is \$825; Farmville, \$2,875; and at Worsham, \$360; giving a total white valuation of \$3,235, total Negro valuation of scientific equipment of \$825.

When we come to commercial education equipment at Moton there is \$1,800 valuation; at Farmville, \$3,000.

Now bear in mind that the Farmville enrollment (and Worsham) is much smaller than the Moton enrollment.

Industrial arts equipment: there is none at Moton; \$6,800 worth at Farmville.

Home Economics equipment: \$1,300 at Moton; \$2,100 at Farmville, \$1,000 at Worsham, making a combined white total of \$3,000 as against \$1,300 at Moton.

In agricultural equipment: that is the only one in which the total for the Negro schools exceeds the number for the whites. (51.,p.97)

Dr. Henderson pointed out significant library figures, showing that the average expenditure for the library at Moton was \$2.10 as compared with a combined total for the white schools of \$3.87, a ratio of 54 cents on the dollar. He said:

There is a tremendous difference in the expenditure per pupil, current expenditure, for the library at the different schools...The Moton-Farmville ratio based on pupils in average daily membership is .41. Negro-white ratio is .39. In other words, seven books for each pupil in average daily membership at Moton and 18 books for each pupil at the white high schools.

...Now the number of square feet of (library) floor space at Moton for every pupil in average daily membership is 1.8; for the white schools, it is 4.0.

...To bring Moton up to the standards of the Southern Association in terms of square feet would require twice as big a facility as they have, whereas the other schools have already met that standard in the terms of number of square footage of library space for every pupil in average daily attendance. (51.,p.107)

Finally, Dr. Henderson compared bussing arrangements for high school students in Prince Edward County:

The Negro buses are considerably more overloaded than the white buses...The practice is for these buses to pick up elementary children on the way and then finally end up at the high school with the Negro students.

But the average daily attendance of high school students would show that the bus is pretty comfortably filled when it leaves Moton with about 33 students on a bus, if every bus were used...But then on the way it must pick up and process--each bus--57 elementary children. Well, now, even granting that some of those elementary children get on and get off; it is reasonable to expect that all those buses would be quite crowded at certain

points in the travel...In other words each bus carries 33 high school children in terms of average daily attendance (when everybody is there, it is still higher), 33 high school children and 57 elementary children. We do not have anything like that in the white schools. (51.,p.117)

It is difficult to see how Negro high school students in Prince Edward County were getting much more than their proportional share of the "Battle Fund" of Virginia in 1951.

The Big Issue Again--Segregation Per Se

Because it included witnesses on both sides of the segregation per se argument, the Virginia case offers one of the most complete discussions of this issue. It is advisable to return to the trial testimony itself to get a total picture.

Mr. Thomas J. McIlwaine, the Division Superintendent of Schools for Prince Edward County, was the first witness in the Virginia court. He was asked how they were striving to secure the ideals of human relations in the school system. He replied each school carried that out in its own way. There were provisions for guidance and counseling in both schools. He was asked if segregated schools interfered with a Negro student's ability to live in groups, his belief in democracy and his development. He answered that he did not see how it would.

Mr. Robert Carter, the NAACP lawyer for the plaintiffs, said that the State Department emphasized that a good educational program should attempt to teach people how to work together in their cultural relationships, stressing a belief in democracy. He asked what the school was doing to provide that. Mr. McIlwaine replied that what they were doing would be the outgrowth of the instruction given in classes, class discussions and in the guidance program.

Mr. McIlwaine was asked how the students could learn to work with other groups when they were confined to the segregated Moton High School. He replied that he felt tolerance and good feeling toward other groups could be taught satisfactorily in the respective schools. When asked if race was the sole criteria for determining whether a child went to the Moton School or Farmville School, Mr. McIlwaine replied that they were operated under the Constitution and laws of Virginia. When asked again if it was race, he said that it was. "The law said race and he followed it, is that right?" Carter asked, to which he replied, "Yes." (51.,p.56-68)

Dr. Brooks of the New Lincoln School

Dr. John Julian Brooks, a teacher and the director of New Lincoln School, New York City, was called to the stand as a plaintiff witness. He was asked if the child who went to the non-Negro school was better able to learn lessons on democracy and civic competence than the child who went to the Negro school. He said that was true and went on to elaborate. The important thing was the act of segregation. In the non-Negro system there was a variety of human beings in every class, every nationality, every background, every race except one---a large, varied group. The Negro school had a relatively small group representing about twenty percent of the community population. This was a group in which there was very little heterogeneity. They all belonged to one race. The students were there because of a discriminatory feeling in the larger community. The very act of segregation did two things: (1) it impoverished the educational opportunities of a small discriminated-against group; (2) it maintained a low level of morale, status, and position that denied equal educational opportunity.

Aims on the Verbal Level

Dr. Brooks was asked to describe some of the aims which educators were attempting to reach through the educational system, and demonstrate how they could be reached. He gave three aims which appeared in the Virginia Board of Education bulletin. He said they were almost self explanatory, and splendid statements:

(1) "The Board of Education of the Commonwealth of Virginia believes in order to achieve self integrity and self respect, each student must have a freedom from fear and a freedom from any sense of inferiority." Dr. Brooks said it was obvious that the discriminated-against minority group did not give equal freedom from feelings of inferiority.

(2) "Students must be taught respect for personality, a belief in the equality of human beings, a desire to cooperate with others." Again Dr. Brooks said he could not see how a Negro student might have a learning-by-living experience to develop respect for personality when his own individual and group personality was not respected. Nor could he have a belief in the equality of human beings when that equality was so obviously denied, or could he have a desire to cooperate with other groups when, by statute, he was forbidden any such experience.

(3) "We must develop good will toward individuals and groups whose race, religion, and nationality differ from our own." (51.,p.161)

Dr. Brooks went on to explain that the meaning of democracy was probably best spelled out by the great documents: the Declaration of Independence, the Constitution, utterances of statesmen through the decades, Wilson's Fourteen Points, The Atlantic Charter, the U. N. Charter. In every case these great documents of human rights had spoken of the equality of humanity and the respect for personality. He said that every hour in which segregation because of race, creed or color existed violated this common concept of democracy. People were listening all over the world for the American interpretation of democracy which this case would bring.

When asked about the results of policies in direct contradiction to studied ideals, Dr. Brooks said that when a person met constant frustration in attempting to reach a promised goal, either he gave up or it became a learning experience with bad results. One of the important stated objectives of education in Virginia was to learn how to work harmoniously with others. It would be a bad learning experience for a Negro child to be rejected when attempting to cooperate with another group.

Dr. Brooks was asked to assume that a school for Negroes and a school for whites offered the same curriculum. Could this curriculum constitute educational equality? He replied that curriculum included all of the school's sponsored experiences in which a child participated. Therefore, the curriculum would not be unequal. The learning and social conditions under which the education experiences took place were also important. Field trips, for example, were an increasingly important part of the curriculum. First-hand experience, was the best way to learn but there were certain field-trip experiences that would contribute to the Negro child's sense of inferiority.

More and more educators realized that an important part of the curriculum was the role of parents in the schools and that parents were one of the real forces of a school. When the non-Negro group included 80 percent of the population, that group composed a wide heterogeneity of vocational practice, all kinds of resources. The majority-group school could turn to these parents for work experience and community relationships. The second group was composed of only one race and color, had a high degree of homogeneity and represented only 20 percent of population; therefore, the experiences in that group were impoverished, limited, routine, as compared with those in the first group.

The Child's Conflict

When asked to demonstrate, step by step, what might possibly happen in the mind of a Negro student in a typical public school system, Dr. Brooks said that the Negro child might start his school day by hearing a Bible reading which frequently spoke of brotherhood and equality. He must make an interpretation immediately between the ethic that was being spoken by the school and the practice in the segregated school system. He would then go on to the Pledge of Allegiance: "One nation indivisible." Wouldn't the student think, "We don't even have an indivisible community?" Suppose the subject matter was biology where he came into contact with chromosomes, genes, blood, races, nationality, and so forth. Having that information he went on to another subject, perhaps civics, including a study of the statutes of several states. He might find that what he had learned in his earlier biology course did not seem to make much sense with the various statutes that he was reading about. His octaroon first cousin might be classified as a Negro in one state but not in another state.

Could civic and economic competence be gained in a segregated school? Again, Dr. Brooks replied that when the school experience was restricted it became difficult to develop equally the attitudes necessary for competence.

When asked about teaching, Dr. Brooks said that educational degrees were not a complete keystone to a teacher's ability. A warm, vital, well-rounded, socially sensitive personality was also essential. Virginia recognized this fact and stated that the teacher should be aided in living a normal life within the community "without being subjected to pressure from individuals or from groups within that community." (51.,p.166) A Negro teacher in a segregated school system cannot have such academic freedom. Negro teachers were ordinarily graduates of Negro schools, which leads to perpetuation of the handicaps of segregation.

Mr. Carter asked if there were any areas where there could be equality with segregation. Dr. Brooks replied that there were some skills such as reading, writing, and arithmetic, which might be taught equally well if the learning process itself were not subject to emotional conditions and other vital factors. Many skills depended upon points of readiness and experience. Mathematics is now taught functionally. A segregated system had a school community so limited and deprived that there were few pegs on which to hang new learnings. That point could be enlarged to cover many areas. Dr. Brooks stated that as overriding as it may sound, he would submit that in the last analysis there was not a good skill, not a good attitude, not a basic understanding, that could be taught equally well in a dual system. Bad skills, bad understandings, and bad competencies could be.

What Price Self Respect?

Upon cross-examination, Dr. Brooks was asked if the Negroes had the finest school building in the state, if the teachers had qualifications in excess of any qualifications of the teachers of the whites, if the teachers were paid salaries fifty percent in excess of salaries paid in the best paid high school in Virginia, if the school had the finest equipment and brand new buses, if in his opinion the Negro child could still not obtain equal educational opportunities and advantages as compared with the white child. He replied that those were fine things, but that the large teaching salaries, shining buses, and the fine brick buildings were poor compensation for humiliation, lack of self-respect, and a restricted curriculum.

Miscegenation Again

Mr. Moore asked Dr. Brooks' opinion regarding laws pertaining to miscegenation. Mr. Carter objected and the Judge agreed that the question was a little far removed but said that Dr. Brooks could answer it as reflecting on the general philosophy. Dr. Brooks replied that he was there as an educational expert and would not profess to make decisions about laws per se. He said that while laws are on the books, they should be obeyed by everyone and it was his opinion that education could help us all make increasingly better laws.

At this point, laughter in the courtroom caused Mr. Moore to remark that he did not see the occasion for all the mirth and did not appreciate it. After he had repeated his statement the Judge replied that if there was any unseemly mirth he would very promptly suppress it. (51., p.154-178)

Dr. Smith of Vassar

Dr. M. Brewster Smith, Chairman of the Department of Psychology and Professor of Psychology at Vassar College, was called to the stand. He also testified as a plaintiff witness. He was asked whether or not race and color were considered factors which would determine ability to learn. He said there was no question, as a result of a variety of evidence on this point. Social environment and the kind of schooling and home situation the Negro child grew up in accounted for any difference in intelligence test scores between the two groups. This could not be interpreted as reflecting differences in inherent ability to learn.

Dr. Smith pointed out that in recent years the entire concept of race had turned out to be a very complicated one, far less simple than common popular thinking regarding it. Dr.

Ashley Montague, an eminent anthropologist, assisted by a committee representing the full range of social scientists, issued a document under the auspices of the United Nations. This document pointed out that ways of grouping people in terms of biologically transmitted physical characteristics did not imply similarly transmitted characteristics of ability, temperament, or personality. In effect, the legal definition of Negro, as found in the southern states, is an entirely arbitrary way of categorizing people.

A Second-Hand White Culture

Dr. Smith was asked if he had occasion to examine and study the effects of legal segregation on the individual. He replied that the research literature on the effects of segregation showed that there was definite impairment for the Negro in regard to intellectual and educational development. There were several respects in which this was an inevitable consequence of segregation. Our values, sources of recognition and prestige are predominantly those of a white society. The Negro came here under circumstances that meant, to the extent he developed a culture of his own, it was a "second-hand white culture." Any pattern of human relationships that involved cutting off the Negro from full participation in the predominantly white culture with its historical continuity of values, was, in itself, bound to impoverish the intellectual and educational development of the individual.

In such a situation we cannot expect the Negro child to have the same incentives to educate himself as the white child. The effects of segregation tend to make the Negro more like the common prejudiced conception of him--a stupid, illiterate, apathetic but happy-go-lucky person. The effects of segregation in this sphere are such as to help perpetuate the pattern of segregation and prejudice out of which these effects arise.

Dr. Smith next referred to the effects of segregation in the sphere of emotional, moral and spiritual development of the individual. Legal segregation meant different things, depending upon whether the individual was on the top or bottom side of segregation. For the individual who was segregated against, this was inevitably going to be understood at some psychological level as meaning that, "I, the person segregated against, am someone that has to be kept from associating with people because I am not good enough." This was inherently an insult to the integrity of an individual. In psychological studies of personality development, one of the most widely accepted propositions was that self-respect, self-esteem, being on good terms with one's self,

were crucial for effectiveness in personality. It was also a widely established proposition that we formed our pictures of ourselves, the basis for self-respect, from the way in which we saw others regarding us.

It was pointed out that the effects of segregation maintained a vicious circle which perpetuated the prejudice in segregation itself. The Negro coming out of this set of experiences was less likely to be effective in advancing his position. He was more likely to be apathetic, or rebellious. He was less capable of effective collaboration in the realistic solution of his problems. He presented to the white person the characteristic picture of the Negro stereotype.

Disadvantages to the White Group

Dr. Smith said that in his belief there were also parallel disadvantages to the white group in a system of segregation, particularly in the educational sphere, because of limiting the variety of personal relationships.

Dr. Smith was asked if there were any ways in which this adverse effect impaired the learning process of the child who was subjected to it. His answer was, "Yes." The school was a tremendously important part of this child's experience. Segregation in the school, imposed by the official authority of the state, had greater weight than segregation resulting from preferences of individuals. The high school years were of particular importance because this was the last chance of the educational system to prepare them for citizenship in the outer world.

Judge Dobie asked if he thought bad effects were more apparent and greater at the adolescent or high school level than they were at the elementary school levels. Dr. Smith said both levels were important.

Mr. Carter asked Dr. Smith if all other factors were equal in Farmville, Virginia, could the Negro children who are required to attend a particular high school set aside exclusively for them secure educational advantages and opportunities equal to those available to the other groups? The answer was, "definitely not." Segregation is a social and official insult and has widely ramifying consequences on the individual's motivation to learn and to develop his capacity for effective participation in any realm of life. (51.,p.180-201)

Dr. Isidor Chein Testifies

Dr. Isidor Chein, the Director of Research of the Commission on Community Inter-relations of the American Jewish Conference, was called to the stand as another plaintiff witness. He was asked if he had made a comprehensive study of the views of social scientists regarding the effect of segregation on an individual. He replied that he and Max Deutschler had polled 549 social scientists, of whom 61 per cent responded.

Three primary questions were asked:

- (1) Does the practice of enforced segregation, even if equal facilities are assumed, cause detrimental psychological effects on the members of minority groups who were segregated?
- (2) The same question was asked about detrimental effects on members of the majority or segregating group.
- (3) Was their reply based on personal research and research that they knew about? The social scientists were invited to elaborate upon the responses that they made.

For question one, 90 percent of the total number of respondents said that there were detrimental effects. Two percent said that there were no detrimental effects. The remainder were divided equally between those who had no opinion or those who failed to answer this item.

Eighty-three percent of the respondents said enforced segregation was harmful to the members of the majority group. Four percent said that it was not. The balance were again divided between those who had no opinion or those who did not answer the item.

Most of the respondents indicated more than one basis for their conclusion. About two-thirds referred to their experience. About 60 percent referred to research findings in the literature. About 30 percent referred to their own research. Approximately three percent stated that the basis of their response was purely personal opinion. Seven percent did not answer this particular item.

Dr. Chein was asked if he had reached any conclusions regarding the effects of segregation on individuals. He replied that he had and went on to elaborate:

Those in the segregated group develop feelings and attitudes of inferiority, insecurity, self-doubt,

self-hatred, isolation, cynicism, persecution, extraordinary sensitivity, and anti-social behavior. This is a disturbance in one's sense of reality.

One respondent had said those in the minority group experienced fantastic misvaluations of their problems and themselves. Individuals in the group which does the segregating may experience a sense of guilt and a weakening of their moral system.

On cross-examining Dr. Chein was asked about prejudice between light and dark colored Negroes. Dr. Chein said that this was one of the consequences of prejudice. It is a reflection of attitudes which one develops toward one's self when placed in a world in which one's identity is defined in terms of one group, and one's group is undervalued. Dr. Chein testified that the effect of segregation would be much less marked if there were no law upholding it. The government of Virginia tells the Negro child that he is not fit to associate with white children. (51.,p.202-240)

Dr. Kenneth Clark Again

Dr. Kenneth Clark was called as a witness for the plaintiffs as he had been in South Carolina. He explained the use of projective tests and said that they helped identify damage to a child's self-esteem. He said that earlier there had been evidence of psychological damage to Negro adolescents but now it was known that this damage began as early as four or five years of age.

Judge Dobie asked Dr. Clark how the ego damage was related to segregation. He replied that segregation was the crystallization of prejudice, a wall of psychological stone and steel constantly telling a people that they are inferior and cannot escape prejudice. Prejudice is something inside people and segregation is the outward expression of what these people have inside.

Dr. Clark was asked how or if educational segregation interfered with a child's learning process. He replied that when a person's self-esteem is damaged he may react by withdrawing, becoming rebellious, by hating himself, by becoming hypersensitive about racial matters. The school or any situation which reminds a child of his inferiority would be a place in which he could not generally profit.

Fourteen Negroes of Moton High School had been interviewed by Dr. Clark. To the request, "Just tell me about your school," all fourteen responded with something negative about their own school. In contrast, none of the colored children seemed to

think anything might be wrong with the white school. The setting up of barriers had led to a distorted concept of reality. Dr. Clark was asked if he had drawn any conclusions concerning the effect of segregation on these children. He said he had taken particular notice of the teenager's excessive preoccupation with matters of race. It seemed to him to support the conclusion that probably the most detrimental consequence of segregation is the degree to which it obsesses everybody with race, white and Negro children, churchmen and laymen.

Dr. Clark was asked if, with equal physical opportunities, the segregated Negro child could obtain an equal education. He indicated they could not. He said he thought the evidence showed that a child being taught moral values in a situation which contradicted these moral values becomes confused about the meaning and the significance of the values, and tends to react to this confusion either by cynicism or rejection of moral values. Fundamentally he questions the integrity of the individuals who attempt to teach him morality and practice immorality at the same time.

New Buildings Versus Dignity

Upon cross examination Dr. Clark was asked to assume that a school was built in Prince Edward County which had better buildings and equipment than any other in the region; all the teachers had Ph.D. degrees in Education and had taught for twenty years; they were paid salaries in excess of other high school teachers in Virginia; pupils had brand new buses to ride to school every day; they had curricula better than any high school in the state of Virginia. Would he insist that under these circumstances the Negro child in Prince Edward County could not get equal advantages and opportunities to those of the white child?

Dr. Clark replied:

I insist that, Mr. Moore, and I insist it most sincerely, because I do not believe material things are as important as your question would suggest that they are. And I go further. I would say, give them all of these material superiorities which you describe in your question, and given that, as part of the education of the Negro child in a segregated situation, these very material things which you now describe as signs of superiority will, themselves, become tainted with stigma; they, themselves, will

become the badge of personal inferiority. Material things have no value in themselves. No material attempt at equality can substitute for essential dignity, acceptance, and humanity, which every human being, without regard to his color, his religion, or national background, must feel, if he is going to be a fully mature and fully adult human being. You cannot buy it with bricks and mortar. (51.,p245-291)

Defendants' Witnesses

T. J. McIlwaine had previously been on the stand as a defense witness. He was recalled for cross-examination and asked what, in his opinion, would be the effect upon racial relationship in the community if segregation were outlawed. He said that conversation with both white and Negro men indicated that it would be a calamity. He said that the children of Moton High School appeared to be a normal set of young people, not unhappy, down-trodden, prejudiced, hostile, or aggressive. He testified that he thought the Negro children could get equal education in a segregated system. He said he did not believe that the white children had a superiority complex, coupled with a sense of guilt. (51.,p.391-394)

White and Negro Masses Would Suffer

Dowell J. Howard, the State Superintendent of Public Instruction, testified on behalf of the defendants. He was asked what the impact of integration would be on the state of Virginia. Mr. Howard stated that he was interested in the education of both white and Negro and what he had to say was in the best interest of the Negro race. He said it was his opinion that the educational system in America would not have begun on an integrated basis. The citizens believed that, for the best interests of white and Negro, separate schools were best and the people were not prepared for a drastic change. He said you cannot legislate customs, beliefs and feelings; integration would be a catastrophe if applied immediately; the people of Virginia would reduce local appropriations; private schools would increase and the white and Negro masses would suffer. (51.,p.438-451)

An Ex-Governor and University President

Colgate W. Darden, President of the University of Virginia and ex-governor of the state testified for segregation. He made it explicit that he was speaking for himself and not for the University. He was questioned as follows:

MR. MOORE: I would like to ask you this question, sir. In your judgment, does separation place a stigma, induce sensitiveness of inferiority or superiority, impair or thwart development of personality so as to preclude attainment of the ideals of democratic citizenship in the Negro child or in the white child?

DR. DARDEN: Not necessarily. But I would like to qualify that to this extent. I think there is great danger of that in the Southern states for the reason that segregation has been, in many instances, used as a shield of oppression and discrimination, of mistreatment. It is not necessarily true, in my opinion, that that should follow. All people who are interested in the advancement of the two races, it would seem to me, would be charged with the responsibility of seeing that that is wiped out. I think we have made enormous progress toward the wiping of it out in my lifetime, and more especially in the last fifteen or twenty years. But there is no question in my mind that in the past there has been too intimate association between segregation and discrimination and oppression for us not to be forewarned of its danger. I do not believe it necessarily follows. As a matter of fact, I think the races separated, if given a fairly good opportunity, are better off. But it will not be true unless there is good faith and good purpose and honesty in giving them that opportunity, black and white alike.

MR. MOORE: Governor, in your opinion, can Negro children, in view of their history, the customs and traditions, and the feeling of the people, secure as good or equal opportunities and advantages in the field of training and education in a mixed school as they could, on the other hand, secure in a separate school with equal facilities, under the tutelage and direction of qualified teachers of the white race, on the other hand?

DR. DARDEN: That is a long question, and I am not sure I can answer it Yes or No, but I am not sure which side I would be on when I got through.

MR. MOORE: It is clumsily stated.

DR. DARDEN: I believe that, given good schools and good teachers, the children in separate schools in Virginia would be better off than in mixed schools.

MR. MOORE: Are you prepared to state as to how Virginia compares with other states in the public school program in this matter?

DR. DARDEN: I think it compares well, but I haven't the precise knowledge which would enable me to, or qualify me to make an authoritative statement on that...I hope it does, and I think it does, but I am not sure. (51.,p.457-462)

Dean Lindley Stiles

Dr. Lindley Stiles, Dean of the Division of Education at the University of Virginia, and later to become Dean of Education at the University of Wisconsin, also said that he spoke as a citizen and not as a representative of the University. He was one of the expert witnesses called by the defense. He said we were working toward a time when segregation would begin to disappear and that anybody working for better schools was working for the abolition of segregation. When asked what effect a court decree abolishing segregation would have on the high school situation in Prince Edward County and in the state of Virginia, he thought if people were not ready, they would ignore the court decree, in spite of the law. He testified that the relationship between the teacher and the child, and between the child and the group in the school, is of utmost importance in terms of how much and how well the child learns in school. The teacher's acceptance of a child, her understanding of him and his background are vital factors in her ability to teach him. He felt that without a period of transition, there would not be acceptance by white teachers of the Negro pupils.

Dr. Stiles said that, where segregation prevails by law, people depend upon law and custom to maintain an acceptable division of races. Where law does not exist, prejudice is substituted. He continued, if you put white and Negro children together, the outcome will be better feeling toward each other; but that will not be true if you put children of widely divergent cultural levels together. If a Negro student is retarded in adjustment, it is possible that his white companions will ascribe his dullness to all the members of his race. Dean Stiles testified that he felt the Negroes would be in a worse situation at the present time, taking into consideration the prevailing attitudes, if they were put into mixed schools. (57.,p.486-514)

Dr. William H. Kelly, Director of the Memorial Foundation and Memorial Guidance Clinic, was another defense witness. He testified that segregation exists in all cultures. He said that he was familiar with projective techniques and commented that the results were variable. The social sciences are new sciences, and can't have the exactitude that is possible in the physical sciences, although certain things are pretty well known. He said that he felt it would be difficult to draw concrete opinion from the tests which Dr. Clark gave the fourteen Negro students.

Dr. Kelly commented upon harmful effects of segregation:

What Would Happen to the P.T.A.?

In the discussion of the hurt that would come to children, and that is coming to them by segregation...Now, I don't think so much would happen to the two children's groups if you merged them in the elementary schools. I don't think you would have such a problem there. But I am wondering what would happen to the parent-teacher movement. I think that the greatest problem in the elimination of segregation would come at the junior high school and at the high school level.

Given equal physical equipment and teacher background, Dr. Kelly could visualize no great harm coming to either group under segregation.

The Cross Examination

The cross-examination included this exchange between Mr. Carter, for the plaintiffs, and Dr. Kelly:

MR. CARTER: As a psychiatrist, do you feel that racial segregation is a social situation which has some effect upon personality development of the individual?

DR. KELLY: Yes I do.

MR. CARTER: As a psychiatrist, do you think that social situation is adverse or beneficial to the personality?

DR. KELLY: I would have to say that it is adverse to the personality. (51.,p.514-530)

Next John Nelson Buck, a retired clinical psychologist, was called to testify for the defense. He said that segregation was the normal thing in Virginia and a change must be gradual, so that in the correction of a social ill a greater illness is not produced. He felt that two specific problems would be faced by administrators: (1) extremely great pressure to abandon the present commendable program of providing much better schools for the Negroes; (2) pressure to get them to employ white teachers in place of Negro teachers.

He also felt one of the more serious problems was that the school children, both white and Negro, would express, overtly and covertly, in the school situation, the attitudes of their parents, to the detriment of both white and Negro. Negro children entering white schools for the first time in their lives might be granted the right of association. Perhaps there would

not be too much rejection on the part of the white students, but from an educational standpoint the point is not association but participation and acceptance. He said that he was sorry to say that he did not feel that the Negro student would be accepted by the white teachers and students; segregation was bad, but the lesser of two evils. He did believe that the Negro child would presently be better in a segregated situation and an abrupt change from segregation to integration would be difficult. He pointed out that attitudes, interests and personality adjustments are being developed long before a child enters public schools.

On cross-examination, Dr. Buck was asked if it would be a fair statement to say that the consensus of opinion among people in psychology and related professions is that barriers based on race do harm to the individual. He said that is the consensus, but the harm that is done also depends on many other circumstances; segregation is not the sole cause. (51.,p.530-544)

One Defense Psychologist for Separatism

Dr. Henry E. Garrett, Professor of Psychology at Columbia University and the Chairman of the Psychology Department, was the next expert witness for the defense. He was the teacher of two earlier witnesses, Dr. Chein and Dr. Clark, and had been born and raised in Virginia near the place where the controversy arose. He testified that as long as facilities are equal, the mere fact of separation does not seem to be discriminatory. In the State of Virginia today, taking into account the temper of its people, its mores, its customs and background, the Negro student at the high school level will get a better education in a separate school level.

Upon cross-examination he said:

Most people are opposed, in principle, to any social process which imposes a stigma on other people. If you ask me if I am opposed to sin, I would have to say yes, theoretically. If I am opposed to segregation on an idealistic, theoretical basis, I am, if it imposes inferiority on other groups. (51.,p.559)

Later in his testimony Dr. Garrett said:

If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed

school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school. (51.,p.569)

When asked if he felt racial segregation as presently practiced in the United States was adverse to the individual he replied,

In general, wherever a person is cut off from the main body of society or a group, if he is put in a position that stigmatizes him and makes him feel inferior, I would say yes, it is detrimental and deleterious to him.

Let Them Develop as Negroes

When asked if he knew of a segregated situation where there would not be stigma, Dr. Garrett said:

I think, in the high schools of Virginia, if the Negro child had equal facilities, his own teachers, his own friends, and a good feeling, he would be more likely to develop pride in himself as a Negro, which I think we would all like to see him do, to develop his own potentialities, his sense of duty, his sense of art, his sense of histrionics. My prediction would be that if you conducted separate schools at the high school level for Negroes and whites, one of two things might happen: that the Negroes might develop their sense of dramatic art and music (which they seem to have a talent for), athletics, and they would say, "We prefer to remain as a Negro group." The other would be in a mixed school where, as I said, a great many animosities, disturbances, resentments, and inferiorities would develop. I don't think either of those is certain. I am completely out of crystal balls at the present time, and I am not a very good prophet, but it seems to me those are the two lines it might take in the future. (51.,p.545-572)

Dr. English Testifies

Horace B. English, a Professor of Psychology at Ohio State University, was a witness for the plaintiffs. He testified that when people are constantly subjected to the assumption that they are inferior, the sense of personal worth suffers great damage. A grave damage to all of the things that cause a child to develop into a strong and wholesome personality is inevitable when he is subjected to a barrage of influences, all of which say, "you are inferior." (51.,p.578-582)

The Other Dr. Clark

Dr. Mamie Phipps Clark, Director of the North Side Center for Child Development in New York City and wife of Kenneth B. Clark, testified after Dr. English. It was her opinion that there was absolutely no basis for saying that it is more difficult to adjust at the high school level. When segregation laws are broken down at the graduate level, integration can take place. When segregation laws are broken down at the graduate level, integration can take place. When segregation laws are broken down at the elementary school level, integration can take place. In order to conclude that at the high school level integration is not possible, we would have to assume that at the last day of the sixth grade the child who has matured and accepted other children in the school suddenly changes and can no longer accept other children. Likewise, on the last day of high school all of a sudden he changes back and can accept integration. That process, if it is one of maturity, is a gradual one. It happens over a period of years. She said there is no justification for saying that the high school level is different in this respect.

Dr. Lee's Testimony

After Mrs. Clark, Dr. Alfred McClung Lee, Chairman of the Department of Sociology and Anthropology at Brooklyn College of the City University of New York, was also called for the plaintiffs. He had made several studies of racial tensions and reported that in the case of the Detroit race riot in 1943 the persons who took part in the rioting were from segregated residential districts.

Fifty Years, A Nice Round Number

He was asked to comment on the testimony given which predicted Negro and white education would be set back fifty years if schools were integrated. He said:

There are several ways I could comment on it. In the first place, the idea of setting back fifty years is a typical comment. Something has been 'going to be set back fifty years' for hundreds of years. This argument was used against the abolition of slavery; it was used in England against giving privileges to the Cockneys; it was used in Ireland against treating the Irish as human beings; it was used before that in Wales to keep the Welsh from being treated like human beings. I mean, every possible step to improve the lot of the downtrodden has always been objected to on the grounds that any change in the status quo would set something back fifty years. It is a nice round number and in propaganda you always have nice round numbers. (51.,p.588)

Final Arguments

Both Mr. Robinson and Mr. Carter gave final arguments for the plaintiffs. Mr. Carter concluded:

We take the larger position, that racial segregation, as is practiced in Virginia by statute, has deprived Negroes of equality of educational opportunities. We think that the question of physical facilities alone does not answer the problem. The only way that we have been able to know how to present evidence to a court on what happens in segregation, what goes on, how it affects the individual in terms of the educational offering, is the type of evidence that we have put on before this Court in this trial. I think it is fair to say that the defendants' witnesses, certainly all of their psychological experts, agreed with the consensus of opinion that racial segregation was an adverse situation which had bad effects on the individual. I believe that their experts in the field of education felt that in so far as the aims of education were concerned it would be better for us not to have segregation; and I think that I am fair in saying that the defendants' own experts disagree with the plaintiffs' case only to the extent that they felt that the plaintiffs had come to this Court a little too early, but that this type of thing should have come at some later date. I think that this Court has amply and aptly pointed

out the fact that where there is a question of rights involved, it is not for the defendants or for anyone else to determine whether or not the individual should utilize those rights. So, I think what is before the Court is only whether or not Negroes in Farmville are entitled to a decree which would permit them to attend schools in Farmville, Virginia, without distinctions based upon race and color. Now I believe that the decision of the Supreme Court gives support to our position. (51.,p.595-596)

When asked by Judge Dobie if he knew of a Federal Appellate Court which faced the problem that segregation, per se, was unconstitutional, Mr. Carter replied:

There are two cases in which it has been squarely faced. One of these was the Brown v. Board of Education of Topeka. I must confess that in the conclusions of law, the court found that the decision in Plessy v. Ferguson was still correct, but Your Honor will find that the court made a unanimous finding to the effect that segregation enforced by law weakened the Negro's motivation to learn, and that the court in its opinion was not able to make a distinction between the McLaurin and the Sweatt decisions on the graduate level (and the high school level) of this problem. To summarize our feeling, in so far as the law is concerned, it is that although the Supreme Court of the United States has not made a square holding on the issue of segregation at the elementary and high school levels, the importance of the Sweatt and McLaurin decisions means that the Supreme Court would logically have to extend its findings on the secondary level, and we therefore think that we are entitled to a decree from this Court which will enjoin the operation of the segregation laws of the state of Virginia as applied to elementary and high school education. (51.,p.596-597)

When Mr. Moore spoke for the defense he commented:

From the weight of this evidence, we do know that a perfectly terrible situation would be created, which would be detrimental to the colored children as well as the white, if by court decree the system we now have was done away with. We know it would be detrimental to all of them, and we certainly know, by the weight of this evidence, that if equal facilities, curriculum, and so forth are provided, then there is no reason why the colored child should not receive just as good advantages,

just as good opportunities, as the white child. That is what the weight of this evidence shows. (51.,p.600-601)

Mr. Almond, Attorney General of the State of Virginia, followed Mr. Moore. He said that integration was a condition that Virginia people, literally and morally, were not prepared to accept. They believe and know from experience that separation with equal facilities is morally defensible, in addition to being legally defensible.

Mr. Hill replied for the plaintiffs. He commented on Dr. Garrett's testimony in the following words:

What was significant about Dr. Garrett's testimony? Dr. Garrett said, "yes, they can get equal educational opportunities in separate schools, and I would like to see them build up their schools and develop their talents in music, in rhythm, in athletics." That is foremost in the minds of these people who want segregated schools. Let a Negro develop along certain lines. Athletics, that is all right; music, fine, all Negroes are supposed to be able to sing; rhythm, all Negroes are supposed to be able to dance. But we want an opportunity along with everybody else to develop in the technical fields, we want an opportunity to participate in the business and commerce of this nation. In other words, we want an opportunity to develop our talents, whatever they may be, in whatever fields of endeavor there are existing in this country and a free capitalistic enterprise. I submit that in this segregated school system, you do not have that opportunity. (51.,p.612)

The opinion of the court was filed March 7, 1952, by Judge Albert V. Bryan. He wrote:

Plaintiffs urge upon us that Virginia's separation of the Negro youth from his white contemporaries stigmatizes the former as unwanted; that the impress is alike on the minds of the colored and the white, the parents as well as the children, and indeed of the public generally, and that the stamp is deeper and the more indelible because imposed by law. Its necessary and natural effect, they say, is to prejudice the colored child in the sight of his community, to implant unjustly in him a sense of inferiority as a human being to other human beings, and to seed his mind with hopeless frustration. They argue that in spirit and in truth the colored youth is, by the segregation law, barred from association with the white child, not the white from the colored, that actually it is ostracism for

the Negro child, and that the exclusion deprives him of the equal opportunity, with the Caucasian, of receiving an education unmarked, an immunity and privilege projected by the statutes and constitution of the United States. Eminent educators, anthropologists, psychologists and psychiatrists appeared for the plaintiffs, unanimously expressed dispraise of segregation in schools, and unequivocally testified to the opinion that such segregation distorted the child's natural attitude, throttled his mental development, especially the adolescent, and immeasurably abridged his educational opportunities. For the defendants, equally distinguished and qualified educationists and leaders in the other fields emphatically vouched the view that, given equivalent physical facilities, offerings and instruction, the Negro would receive in a separate school the same educational opportunity as he would obtain in the classroom and on the campus of a mixed school. Each witness offered cogent and appealing grounds for his conclusion. On this fact issue the Court cannot say that the plaintiffs' evidence overbalances the defendants'. But on the same presentation by the plaintiffs as just recited, federal courts have rejected the proposition, in respect to elementary and junior high schools, that the required separation of the races is in law offensive to the national statutes and constitution. They have refused to decree that segregation be abolished incontinently. (51.,p.618-619)

He later stated:

It indisputably appears from the evidence that the separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored "children" in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and wont... In this milieu, we cannot say that Virginia's separation of white and colored children in the public schools is without substance in fact or reason. We have found no hurt or harm to either race. This ends our inquiry. (57.,p.621-622)

Negro schools were found unequal in buildings, facilities, curricula and transportation provisions. The defendants were ordered to "pursue with diligence and dispatch their present program, now afoot and progressing, to replace the Moton buildings, and facilities with a new building and new equipment or otherwise remove the inequality in them." (57.,p.623)

The Emotional Attitude in Virginia

The foregoing summary of the Virginia trial focuses upon the behavioral science theory and research presented by the expert witnesses. It has not attempted to reflect the emotion in the local setting and tactics used by defense attorneys. This part of the story is more expertly told by the late Edmond Cahn, Professor of Law at New York University. In general, Dr. Cahn felt that the Supreme Court gave the right decision on desegregation but for the wrong reasons. He was critical of behavioral science being used as a major basis. Nevertheless, his sense of sportsmanship and decency prompted him to speak with great harshness and insight about the social attitudes revealed in the Virginia trial:

As any healthy-minded person reads the Virginia trial record, it is impossible not to contrast the altruism and sober dignity of the scientists with the behavior of defendants' counsel, who, by his manner of espousing the old order, exposed its cruelty and bigotry. Here was a living spectacle of what racial segregation can do to the human spirit. The segregated society, as defendants own expert had said, was "sick"; and the tactics of cross-examination used by defendants' lawyers showed how very sick it was. I suggest that these pages of the record did not fail of notice in the deliberations of the United States Supreme Court.¹

¹Reprinted from "Science or Common Sense?" by Edmond Cahn in 1954 Annual Survey of American Law by permission of New York University School of Law. Copyright, 1955.

CHAPTER V
THE DELAWARE CASE

Plaintiffs in Delaware Court of Chancery: Belton, et al, (Negroes)
Defendants in Delaware Court of Chancery: Gebhart, et al,
(School Officials)

Counsel for Plaintiffs: Louis L. Redding, Thurgood Marshall,
Jack Greenberg

Counsel for Defendants: H. Albert Young, Louis L. Finger

Expert Witnesses in Behalf of Plaintiffs:

Paul F. Lawrence	Maurice E. Thomasson
Otto Klineberg	Jerome S. Bruner
George A. Kelly	J. Kenneth Morland
Frederick B. Parker	George Gorham Lane
Daniel E. Dodson	Fredric Wertham

Note: This case was won by the Negroes in the two Delaware courts.
Therefore, petitioners to the Supreme Court were the school
officials, respondents were the Negroes. This is the only
one of the five cases won by the Negroes in the lower courts.

NEGRO VICTORY IN DELAWARE

The Big Issue Still at Stake

The Delaware case, Gebhart v. Belton, was the only one of the five public schools cases which the Negroes won in the lower courts. The plaintiffs attacked both unequal facilities and segregation per se. Both the Court of Chancery and the Supreme Court of Delaware found in favor of the Negro plaintiffs. The decision, however, was based upon unequal facilities. The question of segregation per se was left for the United States Supreme Court.

Two actions had been filed in Delaware and were consolidated for trial purposes. In the first action, the plaintiffs were eight Negro minors who had been refused admission to Claymont High School solely because of their color and ancestry. In the second suit, a seven-year-old Negro child was the plaintiff. The child had been refused admission to Hockessin School No. 29 because of race. In the lower courts, the validity of Delaware constitutional provisions and statutes had been challenged.

The defendants denied that segregation in education violated the Fourteenth Amendment¹ and denied that there was substantial inequality between the physical facilities and the educational opportunities offered Negro and white children. They pointed to Section 2, Article X of the Delaware Constitution which read in part:

"The State Board of Education is authorized, empowered, directed and required to maintain a uniform, equal and effective system of public schools throughout the State...The schools provided shall be of two kinds: those for white children and those for colored children."

In upholding the lower court decision for the Negroes, the Delaware Supreme Court refused to review testimony of expert social science witnesses who sustained the plaintiff argument regarding harmful effects of legally enforced segregation on the mental health and educational opportunities of Negro children. The Delaware Supreme Court seemed to leave the door open for the resegregation of Negro pupils as soon as the facilities were equalized. This uncertainty was regretted by teacher resolutions, editorials, and the attorneys on both sides.

¹It was pointed out during argument of Gebhart v. Belton in the Supreme Court that the State of Delaware never ratified the Fourteenth Amendment.

The testimony and arguments in the lower courts dealt with both main points: the inequalities of facilities and the harmful effects of segregation per se.

Paul F. Lawrence, Associate Professor of Education, Howard University, had used the Strayer-Englehart score card to evaluate the physical facilities of two elementary schools, Hockessin School No. 29 (white) and Hockessin School No. 107 (Negro). The highest possible score which these particular schools could have had was 644. The white school received a score of 594 and the Negro school scored 281. (41.,p.A115-116)

Experts in education, psychology, psychiatry and anthropology testified regarding the detrimental effects of segregation per se.

Dr. Otto Klineberg, Professor of Psychology at Columbia University, was one of these witnesses. He was questioned by Mr. Redding, lawyer for the plaintiffs:

MR. REDDING: Dr. Klineberg, are there differences in inborn intellectual capacity among individuals which are determined by whether an individual is Negro or white?

DR. KLIN^EBERG: No. There are, of course, differences in intellectual capacity, but we have no scientific evidence that those differences are determined in any way by the racial origin of the individual.

Mr. Redding was able to argue, "We think (this testimony) completely removes any possibility of a contention that (segregation) legislation today, with the advances in scientific knowledge about the measurement of mental capacities of human beings today, could have any rational basis. (55.,p.48)

Dr. Fredric Wertham, Director of LaFarque Clinic in Harlem, was next called. He was certified by the American Board of Psychiatry and Neurology as a specialist in neurology and psychiatry and had become a member of their examining board.

Dr. Wertham had seen three groups of Delaware children on five different occasions. The Negro and non-Negro children had been selected at random by the Wilmington Branch of the NAACP. The lawyer in the lower court had asked him if disturbance, frustration and impairment were brought about by school segregation, the home environment and other factors.

Dr. Wertham replied that this segregation "can either be... the cause, or give another cause a particular form, bringing a child to delinquency, depression, or withdrawal; or it may only

precipitate it. But what difference does it make? Without this particular thing it would not have happened.

Now, the fact of segregation in public and high schools creates in the mind of the child an unsolvable conflict. This conflict is, in the child's mind, what a foreign object is in the child's body."

Dr. Wertham testified further that state-imposed segregation created a critical inequality in educational opportunities. School segregation, he said, was of paramount importance for a number of reasons. First, it was absolutely clear cut. Second, the state law did it. Third, it was not only discrimination but discrimination of very long duration. Fourth, it was bound up with the whole educational process. The segregation issue hit the child at two very important times in his life, at age six and at adolescence.

He pointed out that the race problem created such insecurity even in mature people, that either children did not dare or did not want to ask their parents about it. If the children did ask they got the same evasive answers they got to an inquiry of, "Where do babies come from?" because their parents had to tell them fairy tales.

Segregation was what Dr. Wertham called "an anxiety producing factor." Most of the children he examined interpreted segregation as punishment. Whether Delaware wanted to punish the children or not, this was the interpretation. The children were punished for something which was not explained to them, not for something they had done.

Segregation produced an unsolvable conflict in Negro children and it seriously interfered with their mental health. State enforced laws gave legal sanction to this segregation. Dr. Wertham said if Delaware employed Professor Einstein to teach Negroes in marble halls he would still say segregated education was unequal. (41.,p.75a-83a)

Ellis O. Knox, Professor of Education at Howard University, said that when children were attending a school where they were forced to go by law, the atmosphere, the learning situation, the intangibles tended to make the children realize there were discriminatory forces relegating them to inferior status. Ambition, enthusiasm, wholesome emotional ideals, patterns of conduct, desires of full equality in the American society seldom came to fruition in such environments. (41.,p.100a)

Not Different in the South, Bruner Says

Jerome S. Bruner, Professor of Psychology, Harvard University, was asked to assume that all educational opportunities were equal but that a child had to attend a segregated school. Would the child be injured as a result of the enforced segregation?

Dr. Bruner replied in the positive. He said that generally schools imprint two kinds of skills, intellectual and social. They influence the maturing of a child in a period of great plasticity. He explained that by maturing he meant helping a child become all he was capable of becoming and teaching a child a sense of responsibility in his community.

On the basis of his studies he felt segregation damaged a child's capacity to benefit from education. If a Negro child grew up in a segregated school and had limited contact with the majority white community, the skills necessary in getting along with the majority would not develop normally. The child would find it difficult to take his place in the broader community.

A child's first experiences with segregation may result in a degradation of his self-esteem. The effects of degradation may be apathy, frustration, hostility, a perception of rejection from the majority group. When a person's motivation was lowered it lessened his capacity to learn and minimized his aspirations. (41.,p.124a-128a)

Upon cross-examination, Dr. Bruner was asked if he took into account the mores of all people in a certain locality. He replied that he did. He said, however, that the problems of segregation would not be different in the South than in the North; only the pacing would be different. The same measures would not be taken in Delaware as in North Carolina but the psychological problems involved would be the same.

He was asked if the potential hazards of personality damage of a Negro child would still persist if the segregation barrier were removed but attempts were still made to segregate. He said they would still persist and that great damage would be done to white citizens attitudes as well. (41.,p.RA13-14)

Separate Cannot Be Equal

Daniel W. Dodson, Professor of Education, New York University, testified that, "it is impossible, based upon whatever background or experience and so on that I have, to suppose that 'separate' can be 'equal'." He gave several reasons for believing that segregation was particularly difficult and discriminatory for the Negro

child: (1) It placed a stigma on the minority children. They could not be set apart as inferior and maintain a dignity of selfhood. (2) Their motivation was impaired. (3) Segregation distorted perspective. (41.,p.140a-141a)

Maurice E. Thomasson, the Acting President of Delaware State College, testified that in a segregated school, education would not be as good as it could be in a non-segregated system. He could see no reason for separate school systems unless the person who set up the schools thought the persons sent to certain schools were not quite fit to go to a regular school. When he was asked if he would say segregated schools with equal facilities were unequal he said, "There is that area of stigma and insecurity that goes along with segregated schools and no amount of superiority of equipment could erase it." (41.,p.144a-145a and 115a)

John Kenneth Morland, Assistant Professor of Sociology and Anthropology at the College of William and Mary, testified that enforced segregation injured the Negro child by excluding him from the mainstream of American culture. When asked if the elimination of legally enforced segregation at the elementary and high school level would diminish harmful consequences, he replied he definitely felt it would. In most situations where there was not complete geographical segregation there would be co-mingling of white and Negro students and the acquisition of the main facets of American culture. The elimination of legal segregation would take away the onus which segregation implied.

Sociological experiments had found that attitudes, including prejudices, were the results of ideas rather than contact with individuals and situations, and in no case did Dr. Morland know of an unfavorable situation which developed as a result of doing away with the bars of segregation. (41.,p.151a and 125a)

George Gorham Lane, Associate Professor of Psychology at the University of Delaware, said that segregation harmed the total development of the segregated child's personality. It also limited his opportunities to learn skills and abilities required in a democratic system. Segregation was a restriction which might lead to an outward submission but leave the possibility of unresolved inner tensions and hostile tendencies. The emotionally disturbed person could not learn effectively. (41.,p.152a-154a)

Injures Concept of Self

Frederick B. Parker, Chairman of the Department of Sociology at the University of North Carolina, told the Court that one's concept of self was the core of personality and a major determining factor of an individual's external and internal behavior.

Internal behavior dealt with emotional reactions and external behavior encompassed one's social relationships with others. A concept of self was acquired as a child became socialized. Enforced segregation clearly implied a social definition of inferiority. A malleable child put into a segregated situation would develop attitudes toward himself that reflected those of society toward him. It may induce a child to regard himself as incompetent, irresponsible, lazy, suited for nothing except society's menial services.

The Damaging Effect of Schism

Dr. Parker said that a segregated child was subjected to a set of formal and informal educational influences designed to inculcate the social values of our society: equality of opportunity, dignity of personality, dignity of self. The schism in the situation had a damaging effect on younger people and could lead to frustrations, tensions, aggressions, and hostilities of various kinds. (41.,p.155a-156a)

Kenneth Clark Sees Both Symbol and Fact

Kenneth Clark, Professor of Psychology at the College of the City of New York and Associate Director of the North Side Center for Child Development, had tested forty-one Howard High School students. He concluded that segregation as perceived by them impaired their general functioning. He felt he had "clear-cut evidence of rather deep damage to the self-esteem of these youngsters." (41.,p.RA21)

Dr. Clark pointed out that racial segregation was both the symbol and the fact of institutionalized prejudice and humiliation. It set up a fundamental conflict, a confusion about the nature of the Negro child's own self image. It placed him in a struggle to overcome feelings of inferiority which society continued to impose on him by continuing to segregate him.

Evidence suggested that at as early as five years of age Negro children began to learn to expect rejection by society. They then began to reject themselves, feel inferior, inadequate and conclude that certain kinds of things were not for them because they were Negro. Dr. Clark concluded as follows:

"My interpretation of my own results offers no other conclusion than that a child in a segregated school set-up does have his ability to learn... impaired by the constant reminder (which the segregated set-up is) of his own inferiority and the stigma which society has placed upon him." (41.,p.169a-172a)

George Kelly Finds Loss of Self-Initiated Activities

Dr. George A. Kelly, Professor of Psychology at Ohio State University, testified regarding the significance of travel to the learning process. He said that from psychological studies it was known that confinement to close quarters increased irritability and fatigue in a child. A child spending half an hour on a bus would arrive at school more fatigued, more irritable and less psychologically prepared for learning. Children engaged in three types of daily activities: (1) regimented, (2) guided, and (3) privately initiated and self-governed. The third type of activity was important in a democracy where one must learn self-government. Time taken away from the self-initiated activities and used for bus travel would be detrimental in a child's over-all education. (41.p.131a)

The Attorney General, Mr. Young, who argued for the defense in Delaware, had expressed willingness to accept a decree ordering the State to equalize the schools in question in due time. At the same time, he argued against integration. But the decision of the lower court rejected such an arrangement:

"This would be to say, 'Yes, your constitutional rights are being invaded, but be patient, we will see whether in time they are still being invaded.'"

The decision ruled that the plaintiffs were entitled to realize immediately in the only way that relief was available, by admission to the school with superior facilities. "(For the immediate generation of students), to postpone relief would be to deny relief." (41.)

With the Supreme Court of Delaware upholding the lower court opinion (54.), the case moved up to the Supreme Court of the United States with the Negroes in the unfamiliar position of appellees.

CHAPTER VI

THE DISTRICT OF COLUMBIA CASE

Plaintiffs: Bolling, et al. (Negroes)

Defendants: Sharpe, et al. (School Officials)

Counsel for Plaintiffs: George E. C. Hayes, James M. Nabrit

Counsel for Defendants: Milton D. Korman

Note: This case was called up by the Supreme Court rather than appealed from the U.S. Circuit Court of Appeals for the District of Columbia in order that it might be heard along with the other four school segregation cases. There was no hearing of it before it reached the Supreme Court.

DISTRICT OF COLUMBIA

Dred Scott and "The White Man's Burden"

Negro children had been denied admission to Sousa Junior High School in the District of Columbia solely on the grounds of race. A suit was filed and a motion filed to dismiss it. An appeal was undertaken. However the case, Bolling v. Sharpe (42.), was "called up" by the Supreme Court before it was appealed. The Supreme Court, unlike Congress, refused to ignore what was happening in its own front yard.

Mr. Hayes, opening for the plaintiffs, said the District of Columbia presented an entirely novel question: Is segregation unconstitutional per se? They raised no issue regarding facilities. Their proposition was whether or not the District of Columbia had either the statutory or constitutional power to deny Negro pupils admission to the Sousa Junior High School. The District of Columbia statutes nowhere required segregation. It was solely a matter of school board policy as to whether or not segregation was practiced. The Supreme Court had stated in the Hirabayshi case 320 U.S.81(1943), that any legislation based on racism was immediately suspect. (42.,p.2-14)

The Chief Justice asked Mr. Hayes his views regarding the frame of mind of the people who passed the amendments. Did they intend to have separate schools? Were separate schools set up in the District of Columbia to punish the Negro or were they set up because the Fourteenth Amendment was interpreted to mean that separate schools were permissible? Mr. Hayes said he thought it was not a punishment but an expedient. Justice Frankfurter said he would like to ask Mr. Hayes a question because of the candor with which he knew Mr. Hayes would answer: Did he think the Fourteenth Amendment, or the Fifth, automatically invalidated all legislation which drew a line because of race? Would he say that marriage laws relating to race were unconstitutional? Justice Frankfurter observed that there was a good deal of legislation in this country drawing such lines. Mr. Hayes replied that legislation based upon race was immediately suspect. Justice Frankfurter said that this was a candid and logical answer. It simply meant that such legislation could be valid. There was not a clear absolute prohibition, but good cause must be shown for such rules. (42.,p.14-20)

Mr. James Nabrit, also arguing for the Negro petitioners, took the position that public school board officials in the District of Columbia possessed neither the constitutional nor the statutory power to deny Negro children admission to the Junior High School solely because of race or color. They felt this was the one question to be considered by the Supreme Court. When asked if

this might not be a Congressional prerogative, Mr. Nabrit answered that never in the history of this country had the individual liberties of the citizen been ultimately entrusted to the hands of legislators. The founders of the government refused to agree to the Constitution itself until assured that a Bill of Rights would be added to protect individual liberties. (42.,p.26-28)

Congressional Intent

Mr. Milton Korman spoke for the public school officials. He cited precedents to indicate there could be no question as to the intention of Congress regarding separation of the races in the District of Columbia schools. He pointed out that in 1875 there was a specific declaration by Congress that there should be a dual school system in the District of Columbia. He said the latest expression by Congress regarding separation was the Act of October 24, 1951, which amended the Teachers' Salary Act: "There shall be appointed by the Board of Education on the recommendation of the superintendent of schools a chief examiner for the Board of Education for white schools and a chief examiner for the Board of Education for colored schools." (42.,p.42-54)

This dual system was not set up to stamp Negroes with a badge of inferiority, Mr. Korman said. Behind these Acts was a desire to help the people who had been in bondage. There was an intention by Congress to see that these children were educated in a healthful, wholesome atmosphere, in a place where they were wanted, where there would be a receptive atmosphere for learning for both races without the hostility that undoubtedly Congress feared might creep into integrated situations. He said that we cannot hide from the fact that there was feeling between races in the United States. It was deplorable but we must face facts. There had been outbursts between races in the North where there were not separate schools. Which was better, to throw people together into the schools and perhaps bring that hostile atmosphere into the schoolroom and harm the ability to learn of both races, or to give them completely adequate, separate, full educational opportunities? They would then be instructed on the white side by white teachers who were sympathetic, and on the colored side by colored teachers who were sympathetic. Was it not better for colored children to receive from the lips of their own people education in Negro folklore? If such questions are to be decided, who else should decide it but the legislative branch?

Quotes Dred Scott Decision!

He read part of the decision from Dred Scott v. Sandford, 19 Howard 393 (1857) into the record:

"No one we presume supposes that any change in public opinion or feeling in relation to this unfortunate race in the civilized nations of Europe or in this country should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted...such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended. But while it remains unaltered, it must be construed now as it was understood at the time of its adoption... it is not only the same words but the same meaning, and delegates the same powers to the Government and reserves and secures the same rights and privileges to the citizen, and as long as it continues to exist in its present form it speaks not only in the same words but with the same meaning and intent which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day. This Court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty."

Mr. Korman pointed out that this was said almost 100 years ago, but was equally applicable in 1952. (42.,p.56-61)

Indians and Firewater

He then talked of the American Indian. He said there are chapters of the United States Code which were entitled "Protection of the Indians". Congress legislated especially for them because they needed protection. He said, "You and I can go out and buy a bottle of liquor if we want. The Indian cannot, nowhere in the United States. And he is a citizen. Why? Because it is recognized that it is not good for him and he needs protection." (42.,p.62)

He said that nothing had been taken away from the Negro which he had previously enjoyed. The laws to set up his schools were to give him something, not to take something away.

Mr. Korman believed that the plaintiffs attempted to twist the word "punishment", in using it to describe segregation. The other side cited sociologists and psychologists. His brief listed publications, monographs and psychological treatises that opposed the views of the psychologists named in this and other cases. He did not say that either side was right. He believed the psychological testimony had been demolished by Mr. Davis and Mr. Moore who spoke for South Carolina and Virginia, respectively. (42.,p.69-71)

Mr. Korman claimed that segregation had not been completely broken down in the armed forces where all that was required was an executive order. He called the attention of the court to areas in Washington D. C. where there had been advancement: Negroes were admitted to a number of downtown movies, at all legitimate theaters, to a number of fine restaurants. There was gradual integration on the playground. Negroes were admitted to all recreation areas, accepted into many larger and better hotels, served on the staffs of the hospitals, took part in entertainment and in athletic contests along with white people.

Even in the school system there had been a movement toward breaking down possible feelings of hostility. It had been recently ruled that mixed groups of entertainers could now come into schools and give performances, a privilege previously denied. There were joint meetings of teachers and parents to consider neighborhood betterment. These steps had been accomplished without the intervention of courts or legislative bodies. He "prayed to God" that the day would come when white and colored men would meet together in every place, even in the school, and it would not require arguments before the halls of Congress. He asked for a time when there would be general acceptance of the proposition that the two races can live side by side without friction or hostility. (42.,p.72-73)

Mr. Nabrit Summarizes

Speaking for the Negro plaintiffs Mr. James Nabrit summarized two main arguments to refute. First, he told the court he would accept the series of steps toward integration just listed by Mr. Korman as evidence of the feasibility of school integration. Second, Mr. Korman had denied the existence of a constitutional issue rather than meeting it. Instead he dwelt upon the "white man's burden" and seemed to feel that for some reason it still existed today. Mr. Nabrit said it appeared to him that in 1952, the Negro should not be viewed as anybody's burden. He was a citizen. He was performing his duties in peace. In the bloody hills of Korea he was serving in an unsegregated war.

The basic question here was one of liberty. You either have liberty or you do not. When liberty has been interfered with by the State, it had to be justified. It could not be justified by saying we only take a little liberty. It is justified by the reasonableness of the taking. Mr. Nabrit submitted that in this case, in the capital of the free world, there was no place for a segregated school system. The country could not afford it, the Constitution did not permit it, and the statutes of Congress did not authorize it. (42.,p.75-77)

CHAPTER VII
IN THE SUPREME COURT
Drama and Decision

Master Plan or Sheer Accident?

There was a significant variety of location, school level and state provisions in the five public school desegregation cases which were successfully advanced through the Supreme Court. In fact, one might easily be led to the conclusion that they were carefully selected according to some well-developed master plan. For example, Loren Miller in The Petitioners: The Story of the Supreme Court of the United States and the Negro, says "the NAACP had touched all bases." (12.,p.345)

Kansas was a Northern state with a permissive statute for city elementary schools. Segregation was established by the constitutions of South Carolina, Virginia and Delaware. Congress had long tolerated segregation in the District of Columbia. Whereas the Kansas facilities were mostly equal, the Court found significant differences between the quality of buildings and equipment in both the elementary and high schools of Delaware. In South Carolina and Virginia, the Negro schools were admittedly inferior, but the states were claiming "mammoth efforts" toward equalization. It would be difficult to find a group of states with a more representative variety of segregation issues.

How the five cases were selected was the first main question I raised when interviewing Thurgood Marshall in April, 1967. It might be natural to look back fifteen years to a great success and say, "We planned it that way," since most of our memories are selective. Not so with Mr. Marshall. The following dialogue, from the interview transcript, reveals a modesty and preciseness which gives a different account for this chapter of history:

DR. SPEER: I know you were key man on all the master strategy and planning in the five centers. I don't know how deliberately these five centers were chosen, and how much they occurred by accident.

MR. MARSHALL: Sheer accident. The oldest one was the District of Columbia...that started in the 1940's. It was still pending in the Court of Appeals when the Supreme Court on its own

motion brought it up. The Clarendon County South Carolina case came about by a shift in the county line. In Prince Edward County, Virginia the Negro kids staged a strike on their own. Their parents didn't even know about it, so there was no plan there either. Topeka and Delaware came along slowly by local effort so all five of them were accidents. The nearest one to being planned was the District of Columbia. It had been festering and festering. The others were sudden...

DR. SPEER: No plan?

MR. MARSHALL: None, none. The best proof of it is that once we won the law school and the graduate school, the next case should have been college, then high school, then elementary school. It ended up that the next case was the elementary school. Obviously there was no plan and we were kind of peeved. We didn't want it, but we had it.

DR. SPEER: You mean you thought it was too soon?

MR. MARSHALL: Sure, we wanted to bring it down (by educational levels), one after the other.

Likewise, putting the major emphasis on segregation per se was not part of master strategy in the beginning, as Mr. Marshall indicates in the following dialogue:

DR. SPEER: You say it shifted in South Carolina to segregation per se?

MR. MARSHALL: Well, we all shifted about the same time...We've been trying to argue among ourselves when we did. We're not sure. We have no record.

DR. SPEER: I remember we argued (about the relative emphasis) in Topeka, the afternoon before the trial. The lawyers were there and several witnesses...We finally decided to tell the story as it was. The inequalities were minor and we emphasized segregation per se to which the Court paid a lot more attention.

MR. MARSHALL: Yes, yes. We were first figuring where we would make the most headway, the other way (by equalizing opportunities)...The legal section decided first (to emphasize segregation per se) and then the NAACP convention sort of caught up with us.

Five Cases in Three Days

DR. SPEER: How did all five happen to get to the Supreme Court simultaneously? Was this the decision of the Court?

MR. MARSHALL: Yes.

DR. SPEER: Is this rather unusual?

MR. MARSHALL: No, not to consolidate. They are doing it more and more. But, that's about the first time they pulled one up (District of Columbia). They don't do that very often.

DR. SPEER: They don't usually have five at a time!

MR. MARSHALL: No. Not in three days, whew!...But from the beginning to the end there was no plan to these cases. (32.)

Certiorari

As noted above in Chapter Three, Justice Black and Justice Douglas dissented on the decision to remand the South Carolina case so that a progress report could be made through the district court on the equalization of facilities. These two men, regularly on the liberal end of the bench, indicated that the real issue was segregation per se and that this was sufficient grounds for hearing the case, but at that stage they were the only two so inclined. Four votes are required for certiorari (a decision to hear a case). In an interview on January 30, 1968, Justice Douglas told David Atkinson of the Political Science Department of the University of Missouri at Kansas City, that the four Justices on the Vinson court who voted for certiorari were Douglas, Black, Burton and Minton. (18.)

As Thurgood Marshall explained, the District of Columbia case was not appealed. The Supreme Court took the initiative in calling it up for consideration with the four state cases because it had been "festering and festering" since the 1940's.

The NAACP legal staff had succeeded in getting their cases before the Supreme Court. A large number of lawyers, representing much of the country's leading talent, were gathered by both sides.

As an organization, the American Bar Association did not figure in the segregation cases. Dr. Charles H. Thompson was an active participant and, as Dean of the Howard University Graduate School, was a close observer of the legal steps taken. He reports in an interview:

DR. SPEER: What is your guess on the majority (attitude) of the American Bar Association? Is it a matter of record?

DEAN THOMPSON: It probably is not a matter of record but I had some concern. I knew some of the leaders...and questioned what was going on in one of their committees. They had existing a civil liberties committee which did not even take cognizance of this problem. I think we had earlier concluded at that point in history that the American Bar Association could not be called upon for active sympathetic assistance...That is not to say that there were not several members of the American Bar Association who were active in other organizations working with us. (Professors who were members of the Association of American Law Schools).

DR. SPEER: The American Bar Association itself did not see fit to do this?

DEAN THOMPSON: I think it should be said that I do not know whether they were ever asked.

DR. SPEER: But they did not offer as a group.

DEAN THOMPSON: No. (38.)

I asked Dr. Harry Kalven, Jr., of the University of Chicago Law faculty if the American Bar Association as a group had taken a stand. He responded:

I doubt it...they are almost systematically wrong with the issues on which they have taken stands. As a matter of fact they have taken very few stands as an association...I once had a student do a study on this, the position they have taken on public issues. It turned out to be very uninteresting. We thought it was going to be quite exciting, but it turned out to be uninteresting because as a matter of fact they did not take very many positions. And for the most part it was not very important whether they did or not. They were not, in that sense, a dramatic policy group. (30.)

Preparation and Rehearsal

The Howard University Law School was one convenient base for the lawyers involved in the NAACP case. Dean Thompson described the activities there:

I suppose there were probably fifty or sixty lawyers who were asked to, or volunteered to be of assistance ...social scientists combined with lawyers, historians, sociologists, psychologists met on at least two occasions in New York and prepared position papers (which were) in turn examined by those who had the primary responsibility for developing the briefs... our University Law School had been active in the final preparation which meant that we set up a moot court.

A few days before the case was actually to be argued before the U.S. Supreme Court, we would invite a select group including some distinguished guests from District of Columbia, whom we had reason to believe were objective, if not sympathetic, and they would sit in the court. The lawyers who were going to present the case would argue it and our students were asked to sit in the audience and ask questions. Some of the toughest questions that could possibly be asked were asked. When the attorneys couldn't answer they would then go back into a huddle. I have known the time when we wrangled over the best answers to some questions until four o'clock in the morning. But this had been true for the housing cases and classification cases. The major civil rights cases that were coming up at that time were handled in this general fashion. Of course, the biggest effort was the school desegregation. There were more people involved in that. (38.)

The Oral Arguments Begin

Five cases of such importance and general interest naturally promised a great deal of drama before the U.S. Supreme Court. Oral argument before the Court is not a ceremonial affair or a public performance. Former Supreme Court reporter for the New York Times, Anthony Lewis, attributes a great deal of importance to the arguments before the nine Justices. He quotes Justice Harlan as saying, "A good argument may in many cases make the difference between winning or losing, no matter how good the briefs are." (10,p.162) The reader will find in the Brown v. Topeka hearings before the Supreme Court a number of very pertinent questions and comments by various Justices. Likewise, some of the most effective arguments are found in the impromptu responses of the lawyers, especially Thurgood Marshall.

The lawyers naturally look closely for clues in anything the Justices ask or whisper to each other. According to a story

(maybe apocryphal), one ingenious lawyer hired a lip-reader. Hopefully, at one point, the lawyer asked what Justice Douglas had whispered to a colleague. The reading was: "I wish Frankfurter would stop talking for a few minutes and give the lawyer a chance." (2.,p.68)

Mr. Carter Opens for Kansas

On December 9, 1952, a year and a half after he had helped plead the case in Topeka, Robert Carter led off for Oliver Brown, et al, before the Supreme Court.

He stated that the substance of their argument was "that we have been deprived of the equal protection of the laws where the statute requires appellants to attend public elementary schools on a segregated basis. The act of segregation in and of itself denies them equal educational opportunities which the Fourteenth Amendment secures." (48.,p.4)

Evidence was introduced at Topeka demonstrating that segregation in and of itself handicapped the Negro children and made it impossible for them to secure equal education. Carter emphasized that the Negro children were placed at a serious disadvantage with respect to their opportunity to learn to adjust personally and socially in an isolation which denied them the experience of mixing and learning with a cross section of American society. He stressed that segregation in Topeka relegated the Negro to an inferior caste, lowered his level of aspiration, instilled feelings of insecurity and inferiority, and retarded his mental and educational development. For these reasons it was impossible for the Negro children who were set apart to secure an education which was equal to that available in the eighteen elementary schools maintained exclusively for white children. (48.)

A Complete Shift to Segregation Per Se

As Thurgood Marshall said, "We really started out for separate relief but it shifted in mid-air." In legal strategy, the shift was now complete. The NAACP lawyers were encouraged by winning the University cases and by the strong helpful statements of opinion from the courts in Kansas and Delaware. They were well armed with a mass of social science testimony from a score or more of highly respected "live witnesses" whom the defense had found impossible to counter balance. An effective statement by thirty-two more experts was in an appendix to their brief. They had found new hope in the "equal protection" clause of the Fourteenth Amendment which Professor Kalven described as: "Until then almost a dead letter." (30.)

They were very well prepared to attack race as a basis for classification. They had decided to go the whole way. Carter pointed out explicitly that the District Court had found no material differences between the Negro schools and the white schools with respect to physical facilities, educational qualifications of the teachers or the course of study. Carter argued that under the equal protection clause of the Fourteenth Amendment, no State has authority to use race as a factor in determining educational opportunities.

The target was segregation in and of itself. Although generally accompanied by inferior educational facilities, more serious segregation automatically brought isolation, humiliation and social deprivation that caused deep psychological damage and many handicaps. The attack was on the basic cause, not the superficial tangible accompaniments.

Carter cited the paragraph from Judge Huxman's opinion which Earl Warren was to quote in the 1954 decision:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.

A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated system. (48.p.11)

The Kansas Court had felt bound to rule as it did because of precedent set by Plessy v. Ferguson (59.) and Gong Lum v. Rice (56.). Carter said that it was evident from the court's opinion that it was in "confusion" and "torture" in reaching its conclusion.

Justice Burton asked Mr. Carter, "Is it your position that there is a great deal more to the educational process even in the elementary school than what you read in the books?"

MR. CARTER: Yes, sir; that is precisely the point.

JUSTICE BURTON: And it is on that basis which makes a real difference whether it is segregated or not?

MR. CARTER: Yes, sir. We say that the question of your physical facilities is not enough. The constitution does not...stop with the fact that you have equal physical facilities, but it covers the whole educational process.

CHIEF JUSTICE VINSON: The findings in this case did not stop with equal physical facilities, did they?

MR. CARTER: No, sir; the findings did not stop, but went beyond that. (48.,p.15)

The Chief Justice seemed to want to make sure that the essence of the plaintiff argument was the evils of segregation per se. He asked Mr. Carter if it was found that physical facilities, curricula, courses of study, qualification and quality of teachers, and other educational facilities in the two sets of schools were comparable. Carter answered, Yes. The Justice asked if the only item of discrimination was transportation. (The colored students were transported by bus and the white students were not.) Carter stated that was true. But he added that the Kansas Court had shown how segregation made educational opportunities inferior and "this, we think, is the heart of our case." To Chief Justice Vinson's query, "That is all that you really have here to base your segregation issue upon?", Carter replied, "That is right." (48.,p.18)

Education Not Covered By Plessy Decision?

Knowing the reluctance of the Supreme Court to reverse a previous decision, even after many years had intervened, Carter suggested a way around for the Court. He stated that the Plessy case had nothing to do with opportunities in education: All I am saying is that you do not have to overrule "separate but equal" at the elementary school level in deciding the Kansas case because you have never decided that the "separate but equal" rule applied at the elementary school level.

Justice Frankfurter asked for clarification:

JUSTICE FRANKFURTER: Are you saying that we can say that "separate but equal" is not a doctrine that is relevant at the primary school level? Is that what you are saying?

Justice Douglas, perhaps mindful of the heckling habit of Frankfurter, intervened to answer for Carter.

JUSTICE DOUGLAS: I think you are saying that segregation may be all right in street cars and railroad cars and restaurants, but that is all that we have decided.

MR. CARTER: That is the only place that you have decided that it is all right.

JUSTICE DOUGLAS: And that education is different; education is different from that.

MR. CARTER: Yes, sir.

JUSTICE DOUGLAS: That is your argument, is it not? Isn't that your argument in this case?

MR. CARTER: Yes.

But Justice Frankfurter had more to say on the point. Segregation "was many times decided" to be within the "constitutional power of state legislatures"...You are quite right in suggesting that this question explicitly as to segregation in the primary grades has not been adjudicated by this Court.

He stated however, that a long course of utterances by the Supreme Court and lower courts were, from his point of view, almost as impressive as a single decision. He said he felt it necessary to face the fact that this case dealt with a long exercise of power not only written on the statute books, but confirmed by State courts as well as by expressions of the Supreme Court. He did not seem to feel that segregation through the years could be considered as technically legal in transportation but not in education. In other words, to him, there was no easy way around.

So Carter was flexible. He said earlier that he had suggested a "narrow position" such as the Court had taken in the Sweatt and McLaurin cases. But he was willing to suggest a more complete alternative if the Court preferred:

I have no hesitancy in saying to the Court that if they do not agree that the decision can be handed down in our favor on this (narrow) basis of this approach, that I have no hesitancy in saying that the issue of "separate but equal" should be faced and ought to be faced, and that in our view the "separate but equal" doctrine should be overruled. (48.,p.20-26)

The record shows ten more pages of argument with Mr. Carter on the floor, Justice Frankfurter using 25% of the time.

No Choice for Kansas

As noted above under the Topeka Story (Chapter Two), the Board of Education did not contest the appeal and the Kansas Attorney General's office took no steps until a communication from the Supreme Court stated that Kansas must defend the statute or concede its invalidity. As explained by Attorney John Anderson, who later served Kansas as Attorney General and Governor, there was no choice because the Kansas Supreme Court had repeatedly upheld the statute without being overruled. The Attorney General was obligated to defend the law of the state. (17.)

The assignment had been handed to Assistant Attorney General, Paul Wilson. Before the U.S. Supreme Court, Wilson stated the views of Kansas simply and briefly. "We believe that our statute is constitutional. We do not believe it violates the Fourteenth Amendment...our Supreme Court of Kansas specifically said so." (48., p.36-37) He said it was their theory that the case boiled down simply to whether or not the "Separate but equal" doctrine was still the law.

Three Questions With Philosophical Implications

Justices Frankfurter, Jackson, Burton and Black raised questions regarding the Kansas case which seemed to bear on three principles of the philosophy of constitutional law. The questions no doubt also set the lawyers to speculating about the possible attitudes being revealed by the four Justices involved.

Frankfurter asked Wilson what might be the social consequences if the Supreme Court reversed the decree relating to the Kansas Law. Wilson replied that the consequences probably would not be serious. The Negro population was small. The only difficulties might be in assimilating Negro teachers and administrators into an integrated school system.

Jackson may have been thinking ahead to cases from the South. He asked if a heavier concentration of Negroes could affect the problem. Wilson said that it might.

Several of the Justices asked questions that seemed to show concern about social consequences of a desegregation decision. Other legal theorists insist that the Court should interpret the constitution without regard to public sentiment or consequences. Justice Whittaker, who joined the Court later, seems to hold to the view that the people have their only redress through the amendment process. (39.)

After Wilson had taken the position that the "separate but equal" doctrine of the Plessy and Gong Lum cases were still the law of the land, Justice Burton came up with a question that gave an inkling of his belief in the "Living Constitution":

Don't you realize it is possible that within seventy-five years the social and economic conditions and the personal relations of the nation may have changed so that what may have been a valid interpretation of them seventy-five years ago would not be a valid interpretation of them constitutionally today? (48.,p.46)

Wilson said it ^{was} a possibility but he did not believe that the record disclosed such a change. Burton replied that this might be the difference between saying the Courts of Appeals and State Supreme Courts had been wrong for seventy-five years. Wilson said that until the Supreme Court overruled the Gong Lum and Plessy doctrines they were the best guide available.

Frankfurter entered the act again on this new note:

It was not that the Courts would have to overrule those cases, the Court would simply have to recognize that laws are kinetic, and some new things have happened, not deeming those decisions wrong but bringing into play new situations toward a new decision. (48.,p.46-47)

Wilson admitted the possible validity of this theory and extended the argument of his case on this basis. But he said there was nothing in the findings of the Kansas Court to justify such a conclusion. He stated that he would like to comment on finding of fact Number 8 in the District Court of Kansas, wherein the lower court determined generally that segregation of white and colored children in the public schools had a detrimental effect on colored children. He pointed out that the finding of this fact was based on uncontested evidence. He felt it was obvious the District Court regarded fact Number 8 as legally insignificant, and felt the plaintiffs failed to prove they were entitled to the relief demanded. He said the finding is immaterial as far as the issues of the case are concerned. "The psychological reaction is something which is apart from the objective components of the school system and something that the State does not have within its power to confer upon the pupils therein...fact Number 8 is a general finding. It does not relate to these specific appellants." (48.,p.48)

Carter had saved a few minutes of his time for rebuttal. He said that inequality flowed from segregation and made opportunities unequal in law. Justice Black raised several questions relating to the possible grounds for the case and finally asked: "Are you planning to attach relevance to anything except the question of whether they are separate but equal?"

Finally, Mr. Carter seemed to take a hint from friendly Justice Black and went on to point up alternate bases for a decision: one on the equality of educational opportunity "as they are examined by the approach of McLaurin and Sweatt"; another on the illegality of race as a basis for classification. (48., p.50-53)

Davis and Marshall Clash on South Carolina

The chief counsel of the five cases was the Hon. John W. Davis for the defenders of segregation and Thurgood Marshall for the Negro cause. They confronted each other directly in arguing the South Carolina case before the Supreme Court.

John W. Davis for the Defense

John W. Davis was the most distinguished senior partner of the one-hundred-and-four year old Wall Street law firm of Davis, Polk, Wardwell, Sunderland and Kiendl with a professional staff of approximately one hundred. Mr. Davis had been Governor of West Virginia and Democratic presidential nominee of 1924. A member of a prominent family and son of a lawyer, he had graduated from the Washington and Lee Law School and was admitted to the bar at the age of twenty-two. He had been a member of Congress, Solicitor General, Ambassador to England and advisor to President Wilson at Versailles. His law firm had the Guaranty Trust Company and J. P. Morgan and Company among its clients.

Back of Mr. Davis was not only one of the country's largest law firms but the Attorney Generals of a number of Southern states as *amicus curiae*. We can only speculate as to the amount of the financial backing and donated services.

At the age of eighty, Mr. Davis still had the eloquence, prestige and skill he had brought to many Supreme Court hearings.

Thurgood Marshall for the Plaintiffs

In sharp contrast to John W. Davis as a personality, the plaintiffs had for their chief counsel the grandson of a slave, Thurgood Marshall, who came up the hard way. Due to his own

ability and as part of the total gains of the Negro race which he did a great deal to advance, he was to become a Federal Judge, Solicitor General and, in 1967, an Associate Justice of the Supreme Court.

Mr. Marshall States His Case

Before the Supreme Court, Thurgood Marshall first reviewed the South Carolina case in the District Court and emphasized that equality of tangible facilities was not the issue:

We are saying that there is a denial of equal protection of the laws, the legal phraseology of the clause in the Fourteenth Amendment and not just this point as to equality (of facilities)... Pursuing that line, we produced expert witnesses, who had surveyed the school situation to show the full extent of the physical inequalities, and then we produced (social science) witnesses. Appellees in their brief comment that they do not think too much of them. But they stand in the record as unchallenged as experts in their field, and I think we have arrived at the stage where the courts do give credence to the testimony of people who are experts in their fields.

On the question that was raised a minute ago in the other case about whether or not there is any relevancy to this classification on a racial basis or not...is the testimony of Dr. Robert Redfield--I am sure the Court will remember his testimony in the Sweatt case... that there were no recognizable differences from a racial standpoint between children, and that if there could be such a difference that would be recognizable and connected with education, it would be so insignificant to be unworthy of anybody's consideration.

Mr. Marshall continued with the classification point:

He (Dr. Redfield) has considerable testimony along that line. But we produced testimony to show what we considered to be the normal tack on a classification statute, that this Court has laid down the rule in many cases set out in our brief, that in the case of the object or person being classified, it must be shown that there is a difference in the two, and, also, that the state must show that that difference has a significance with the subject matter

being legislated. The state has made no effort up to this date to show any basis for that classification other than that it would be unwise to do otherwise.

Witnesses testified that segregation deterred the development of the personalities of these children. Two witnesses testified that it deprives them of equal status in the school community, that it destroys their self-respect. Two other witnesses testified that it denies them full opportunity for democratic social development. Another witness said that it stamps him with a badge of inferiority.

The summation of that testimony is that the Negro children have road blocks put up in their minds as a result of this segregation... (44.,p.4-6)

After referring to the only counter testimony offered, (that of two undistinguished school men pointed out above) Mr. Marshall went on to chide the defense:

That is the only evidence in the record for the appellees here. They wanted to put in the speech of Professor Odom, and they were refused the right to put the speech in, because, after all, Professor Odom was right across, in North Carolina, and could have been called as a witness.

So here we have a record that has made no effort whatsoever--no effort whatsoever--to support the legislative determinations of the State of South Carolina. And this Court is being asked to uphold those statutes, the statute and the constitutional provision because of two reasons. One is that these matters are legislative matters, as to whether or not we are going to have segregation. For example, the majority of the court in the first hearing said, speaking of equality under the Fourteenth Amendment, "How this shall be done is a matter for the school authorities and not for the court, so long as it is done in good faith and equality of facilities is offered."

Again the court said, in Chief Judge Parker's opinion: "We think, however, that segregation of the races in the public schools, so long as equality of rights is preserved, is a matter of legislative policy for the several states, with which the Federal courts are powerless to interfere."

So here we have the unique situation of an asserted Federal right which has been declared several times by this Court to be personal and present, being set aside on the theory that it is a matter for the state legislature to decide, and it is not for this Court. And that is directly contrary to every opinion of this Court.

In each instance where these matters come up in what, if I say "sensitive" field, or whatever I am talking about, civil rights, freedom of speech, et cetera-- at all times they have this position. The majority of the people wanted the statute; that is how it was passed.

There are always respectable people who can be quoted as in support of a statute. But in each case, this Court has made its own independent determination as to whether that statute is valid. Yet in this case, the Court is urged to give blanket approval that this field of segregation, and if I may say, this field of racial segregation, is purely to be left to the states, the direct opposite of what the Fourteenth Amendment was passed for, the direct opposite of the intent of the Fourteenth Amendment and the framers of it. (44.,p.9-10)

A little later, reference was made to Elkinson v. Deliesseline of 1823:

...a case involving the statute of South Carolina, which provided that where free Negroes came in on a ship into Charleston, they had to put them in jail as long as the ship was there and then put them back on the ship--and it was argued...that this was necessary... to protect the people of South Carolina, and the majority must have wanted it and it was adopted.

Mr. Justice Johnson's Supreme Court opinion in this case was quoted in part:

But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the Federal Constitution and its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand.

There is a lot of other language and other opinions, but I think that this is very significant. (44.,p.11-12)

Chief Justice Vinson asked several questions dealing with the various elements involved in equality. Mr. Marshall went back to the McLaurin and Sweatt cases:

Of course, those decisions were limited to the graduate and professional schools. But we took the position that the rationale, if your please, or the principle, to be stronger, set out in those cases would apply just as well down the line provided evidence could be introduced which would show the same type of injury.

That is the type of evidence we produced, and we believed that on the basis of that testimony, the District Court should properly have held that in the area of elementary and high schools, the same type of injury was present as would be present in the McLaurin or the Sweatt case.

However, the District Court held just to the contrary, and said that there was a significant difference between the two. That is, in the Sweatt case it was a matter of inequality, and in the McLaurin case, McLaurin was subject to such humiliation, et cetera, that nobody should put up with it, whereas in this case, we have positive testimony from Dr. Clark that the humiliation that these children have been going through is the type of injury to the minds that will be permanent as long as they are in segregated schools, not theoretical injury, but actual injury.

We believe that on the basis of that, on that narrow point of Sweatt and McLaurin--on that I say, sir, that we do not have to get to Plessy v. Ferguson; we do not have to get to any other case, if we lean right on these two cases--we believe that there is a broader issue involved in these two cases, and despite the body of the law, Plessy v. Ferguson, Gong Lum v. Rice, the statement of Chief Justice Hughes in the Gaines case, some of the language in the Cumming case, even though not applicable as to here--we also believe that there is another body of law, and that is the body of law on the Fifth Amendment cases, on the Japanese exclusion cases, and the Fourth Amendment case, language that was

in Nixon v. Herndon, where Mr. Justice Holmes said that the states can do a lot of classifying that nobody can see any reason for, but certainly it can not go contrary to the Fourteenth Amendment; then the language in the Skinner case, the language of Mr. Justice Jackson in his concurring opinion in the Edwards case.

So on both the Fourteenth Amendment and the Fifteenth Amendment, this Court has repeatedly said that these distinctions on a racial basis or on a basis of ancestry are odious and invidious, and these decisions, I think, are entitled to just as much weight as Plessy v. Ferguson or Gong Lum v. Rice. (44.,p.14-15)

Mr. Marshall's point was later picked up by Earl Warren and stated with even greater emphasis in the final decision:

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. (49.)

"Abstract Starting Point of Natural Law"---Frankfurter

Justice Frankfurter interrupted the discussion on proper basis for classification:

JUSTICE FRANKFURTER: Then you have to face the fact that this is not a question to be decided by an abstract starting point of natural law, that you cannot have segregation. If we start with that, of course, we will end with that.

MR. MARSHALL: I do not know of any other proposition, sir, that we could consider that would say that because a person who is as white as snow with blue eyes and blond hair has to be set aside.

JUSTICE FRANKFURTER: Do you think that is the case?

MR. MARSHALL: Yes, sir. The law of South Carolina applies that way.

JUSTICE FRANKFURTER: Do you think that this law was passed for the same reason that a law would be passed prohibiting blue-eyed children from attending public schools? You would permit all blue-eyed children to go to separate schools? You think that this is the case?

MR. MARSHALL: No, sir, because the blue-eyed people in the United States never had the badge of slavery which was perpetuated in the statutes.

Then Justice Frankfurter jumped to "the facts of life" and the inescapable sociological consequences of desegregation:

JUSTICE FRANKFURTER: Do you really think it helps us not to recognize that behind this are certain facts of life, and the question is whether a legislature can address itself to these facts of life in despite of or within the Fourteenth Amendment, or whether, whatever the facts of life might be, where there is a vast congregation of Negro population as ~~against~~ the states where there is not, whether that is an irrelevant consideration? Can you escape facing those sociological facts, Mr. Marshall?

MR. MARSHALL: No, I cannot escape it. But if I did fail to escape it, I would have to throw completely aside the personal and present rights of those individuals.

JUSTICE FRANKFURTER: No, you would not. It does not follow because you cannot make certain classifications, you cannot make some classifications.

MR. MARSHALL: But the personal and present right that I have to be considered like any other citizen of Clarendon County, South Carolina, is a right that has been recognized by this Court over and over again. And so far as the appellants in this case are concerned, I cannot consider it sufficient to be relegated to the legislature of South Carolina where the record in this Court shows their consideration of Negroes, and I speak specifically of the primary cases...I think that when an attack is made on a statute on the ground that it is an unreasonable classification, and competent, recognized testimony is produced, I think then the least that the state has to do is to produce something to defend their statutes.

JUSTICE FRANKFURTER: I follow you when you talk that way.

MR. MARSHALL: That is part of the argument, sir. (44.,p.17-19)

The above dialogue is a typical example of Mr. Marshall's cleverness in taking a profound or perhaps ambiguous question by Justice Frankfurter and turning it into a simple clinching argument that even won the agreement of the "little Justice" himself.¹

¹Felix Frankfurter was five feet, five.

Immediately following is another example of a clear answer to a not-so-clear question of formal logic:

JUSTICE FRANKFURTER: But when you start, as I say, with the conclusion that you cannot have segregation, then there is no problem. If you start with the conclusion of a problem, there is no problem.

MR. MARSHALL: Mr. Justice Frankfurter, I was trying to make three different points. I said that the first one was peculiarly narrow, under the McLaurin and the Sweatt decisions. The second point was that on a classification basis, these statutes were bad. The third point was the broader point, that racial discrimination in and of itself is invidious. I consider it as a three-pronged attack. Any one of the three would be sufficient for reversal. (44.,p.20)

Near the end of his allotted time, Mr. Marshall began to summarize by saying:

So what do we have in the record? We have testimony of physical inequality. It is admitted. We have the testimony of experts as to the exact harm which is inherent in segregation wherever it occurs. (44.,p.23)

But Justice Frankfurter was concerned about how school district lines might be drawn in case of desegregation in South Carolina, whether there might be gerrymandering and the development of Negro ghettos. His fears were somewhat prophetic:

JUSTICE FRANKFURTER: I think that nothing would be worse than for this Court--I am expressing my own opinion--nothing would be worse, from my point of view, than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks. (44.,p.25)

When Justice Frankfurter asked for a "spelling out" of what might happen, Mr. Marshall said:

I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think whatever district lines they drew, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint. (44.,p.25)

With his opponent, John W. Davis, coming up, Mr. Marshall said he would like to save his remaining fifteen minutes for rebuttal.

Mr. Davis Refutes and Presents

Mr. Davis opened by saying:

If the appellants' construction of the Fourteenth Amendment should prevail here...I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity. If it may classify it for one purpose on the basis of admitted facts, it may, according to my contention, classify it for others.

A few minutes earlier, Marshall had said:

In the brief for the appellees in this case and the argument in the lower court, I have yet to hear anyone say that they denied that these children are harmed by reason of this segregation. Nobody ~~denies~~ that, at least up to now. So there is a grant, I should assume, that segregation in and of itself harms these children. (44.,p.23)

This would seem to be a direct challenge for John W. Davis. But he took up three other prepared points first: the rapid progress being made in equalizing facilities; the intent of the Fourteenth Amendment (which the Court concluded was a futile argument the following year); and finally, the issue was one of legislative concern, not judicial.

Before closing his detailed description of the great effort made by South Carolina to equalize facilities, Mr. Davis asked Mr. Marshall to take full cognizance of the real consequences of his redistricting program:

(In) the district here in controversy, there are now, speaking of the report of last March, 2,799 registered Negro students and 295 registered white students. In other words, the proportion between the Negroes and the whites is about in the ratio of 10 to 1. And whether discrimination is to be abolished by introducing 2,800 Negro students in the schools now occupied by the whites, or conversely introducing 295 whites into the schools now occupied by 2,800 Negroes, the result in either event is one which one cannot contemplate with entire equanimity. (44.,p.40)

Mr. Davis called his second point, dealing with the interpretation of the Fourteenth Amendment, "the crux of the case." He apologized for using only five pages in the brief for so important an argument. He gave two reasons for its brevity:

The first is that the opinion of Judge Parker rendered below is so cogent and complete that it seems impossible to add anything to his reasoning. The second is, perhaps more compelling at the moment, that your Honors have so often and so recently dealt with this subject that it would be a work of a supererogation to remind you of the cases in which you have dealt with it or to argue with you, the authors, the meaning and scope of the opinions you have emitted.

But if, as lawyers or judges, we have ascertained the scope and bearings of the equal protection clause of the Fourteenth Amendment, our duty is done. The rest must be left to those who dictate public policy, and not to courts.

How should we approach it? I use the language of the court: "An amendment to the Constitution should be read, " you have said, "in a sense most obvious to the common understanding at the time of its adoption, for it was for public adoption that it was proposed."

Still earlier you have said: "It is the duty of the interpretation to place ourselves as nearly as possible in the condition of those who framed the instrument."

Justice Burton had a question:

JUSTICE BURTON: What is your answer, Mr. Davis, to the suggestion mentioned yesterday that at that time the conditions and relations between the two races were such that what might have been unconstitutional then would not be unconstitutional now?

MR. DAVIS: My answer to that is that changed conditions may affect policy, but changed conditions cannot broaden the terminology of the Constitution, the thought is an administrative or a political question, and not a judicial one.

JUSTICE BURTON: But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted. Did we not go through with that in connection with child labor cases, and so forth?

MR. DAVIS: Oh, well, of course, changed conditions may bring things within the scope of the Constitution which were not originally contemplated, and of that perhaps the aptest illustration is the interstate commerce clause.

Justice Frankfurter pushed for a comparison:

JUSTICE FRANKFURTER: Mr. Davis, do you think that "equal" is a less fluid term than "commerce between the states"?

MR. DAVIS: Less fluid?

JUSTICE FRANKFURTER: Yes.

MR. DAVIS: I have not compared the two on the point of fluidity.

JUSTICE FRANKFURTER: Suppose you do it now.

MR. DAVIS: I am not sure that I can approach it in just that sense.

JUSTICE FRANKFURTER: The problem behind my question is whatever the phrasing of it would be.

MR. DAVIS: That what is unequal today may be equal tomorrow, or vice versa?

JUSTICE FRANKFURTER: That is it.

MR. DAVIS: That might be. I should not philosophize about it. But the effort in which I am now engaged is to show how those who submitted this amendment and those who adopted it conceded it to be, and what their conduct by way of interpretation has been since its ratification in 1868.

JUSTICE FRANKFURTER: What you are saying is, that as a matter of history, history puts a gloss upon "equal" which does not permit elimination or admixture of white and colored in this aspect to be introduced?

MR. DAVIS: Yes, I am saying that.

JUSTICE FRANKFURTER: That is what you are saying?

MR. DAVIS: Yes, I am saying that. I am saying that equal protection in the minds of the Congress of the United States did not contemplate mixed schools as a necessity. I am saying that, and I rest on it, though I shall not go further into the congressional

history on this subject, because my brother Korman speaking for the District of Columbia will enter that phase of it.

It is true that in the Constitution of the United States there is no equal protection clause. It is true that the Fourteenth Amendment was addressed primarily to the states. But it is inconceivable that the Congress which submitted it would have forbidden the states to employ an educational scheme which Congress itself was persistent in employing in the District of Columbia...

What does this Court say? I repeat, I shall not undertake to interpret for your Honors the scope and weight of your own opinions. In Plessy v. Ferguson, Cumming v. Richmond County Board of Education, Gong Lum v. Rice, Maria College v. Kentucky, Sipuel v. Board of Regents, Gaines v. Canada, Sweatt v. Painter, and McLaurin v. Oklahoma, and there may be others, for all I know, certainly this Court has spoken in the most clear and unmistakable terms to the effect that this segregation is not unlawful. I am speaking for those with whom I am associated.

We find nothing in the latest cases that modifies that doctrine of "separate but equal" in the least. Sweatt v. Painter and similar cases were decided solely on the basis of inequality, as we think, and as we believe the Court intended.

It is a little late, said the court below, after this question has been presumed to be settled for 90 years--it is a little late to argue that the question is still at large.

I want to read just one of Judge Parker's sentences on that. Said he:

It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States and great judges of high courts, have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. Constitutional principle is the same now that it has been throughout this period, and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts.

Members of the judiciary, it goes on to say, have no more right to read their ideas of sociology into the Constitution than their ideas of economics. (44.,p-41-47)

Mr. Davis and the Experts

Then Mr. Davis turned to the expert testimony:

"We have the uncontradicted testimony of expert witnesses that segregation is hurtful, and in their opinion hurtful to the children of both races, both colored and white. These witnesses severally described themselves as professors, associate professors, assistant professors, and one describes herself as a lecturer and adviser on curricula. I am not sure exactly what that means.

I did not impugn the sincerity of these learned gentlemen and lady. I am quite sure that they believe that they are expressing valid opinions on their subject. But there are two things notable about them. Not a one of them is under any official duty in the premises whatever; not a one of them has had to consider the welfare of the people for whom they are legislating or whose rights they were called on to adjudicate. And only one of them professes to have the slightest knowledge of conditions in the states where separate schools are now being maintained. Only one of them professes any knowledge of the conditions within the seventeen segregating states.

...I am tempted to digress with the professors because I am discussing the weight and pith of this testimony, which is the reliance of the plaintiffs here to turn back this enormous weight of legislative and judicial precedent on this subject. I may have been unfortunate, or I may have been careless, but it seems to me that much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.

One of these witnesses, Dr. Krech, speaks of a severed school, gives, as he says, "what we call in our lingo environmental support for the belief that Negroes are in some way different from and inferior to white people, and that in turn, or course, supports and strengthens beliefs of racial differences, of racial inferiority."

I ran across a sentence the other day which somebody said who was equally as expert as Dr. Krech in the "lingo" of the craft. He described much of the social science as "fragmentary expertise based on an examined presupposition," which is about as scientific language as you can use, I suppose, but seems to be entirely descriptive...

You have often heard it said that "an ounce of experience is worth a pound of theory." (44.,p.50-53)

After referring briefly to the several witnesses called for the defense in South Carolina, Mr. Davis turned to a statement of sympathy for the Negro child:

Let me read a sentence or two from Dr. W.E.B. DuBois. I may be wrong about this, but I should think that he has been perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country. Says he:

It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to "fight" this thing out--but, dear God, at what a cost.

He goes on:

We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated.

If this question is a judicial question, if it is to be decided on the varying opinions of scholars, students, writers, authorities, and what you will, certainly it cannot be said that the testimony will be all one way. Certainly it cannot be said that a legislature conducting its public schools in accordance with the wishes of its people--it cannot be said that they are acting merely by caprice or by racial prejudice.

Says Judge Parker, again:

The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuum or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied.

Once more, your Honors, I might say, what underlies this whole question? What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education of their young?

Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be unwelcome contact?

I respectfully submit to the Court, there is no reason assigned here why this Court or any other should reverse the findings of 90 years. (44.,p.50-55)

Mr. Marshall Sums Up in Rebuttal

John W. Davis closed his argument by saying, "There is no reason assigned here why this Court or any other should reverse the findings of ninety years."

Thurgood Marshall opened his rebuttal by noting the present conditions resulting from those ninety years. In contrast to the rhetorical eloquence and traditional approach of John W. Davis, Thurgood Marshall uses simple and direct logic, tying the Negro cause closely to the Fourteenth Amendment and its recent interpretations. It is best to let him speak for himself: (Emphasis added)

MR. MARSHALL: May it please the Court, so far as the appellants are concerned in this case, at this point it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states...

There is nothing involved in this case other than race and color, and I do not need to go to the background of the statutes or anything else. I just read the statutes, and they say, "White and colored."

While we are talking about the feelings of the people in South Carolina, I think we must once again emphasize that under our form of government, these individual rights of minority

people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this Court.

If I might digress just for a moment, on this question of the will of the people of South Carolina, if Ralph Bunch were assigned to South Carolina, his children would have to go to a Jim Crow school. No matter how great anyone becomes, if he happens to have been born a Negro, regardless of his color, he is relegated to that school.

Now, when we talk of the reasonableness of this legislation, the reasonableness, the reasonableness of the Constitution of South Carolina, and when we talk about the large body of judicial opinion in this case, I respectfully remind the Court that the exact same argument was made in the Sweatt case, and the brief in the Sweatt case contained, not only the same form, but the exact same type of appendix showing all the ramifications of the several decisions which had repeatedly upheld segregated education.

I also respectfully remind the Court that in the Sweatt case, as to the public policy of the State of Texas, they also filed a public opinion poll of Texas showing that by far the majority of the people of Texas at this late date wanted segregation.

I do not believe that that body of law has any more place in this case than it had in the Sweatt Case. (44.,p.55-56)

Insofar as the argument about the states having a right to classify students on the basis of sex, learning ability, et cetera, I do not know whether they do or not, but I do believe that if it could be shown that they were unreasonable, they would fall, too, that any of the actions of the state administrative officials that affect any classification must be tested by the regular rules set up by this Court.

So we in truth and in fact have what I consider to be the main issue in this case. They claim that our expert witnesses and all that we have produced are a legislative argument at best; that the witnesses were not too accurate, and were the run-of-the-mill scientific witnesses.

But I think if it is true that there is a large body of scientific evidence on the other side, the place to have produced that was in the District Court, and I do not believe that the State of South Carolina is unable to produce such witnesses for financial or other reasons.

A Question on Witnesses

JUSTICE FRANKFURTER: Can we not take judicial notice of things by people who competently deal with these problems? Can I not take judicial notice of Myrdal's book without having him called as a witness?

MR. MARSHALL: Yes, sir. But I think when you take judicial notice of Gunnar Myrdal's book, we have to read the matter, and not take portions out of context. Gunnar Myrdal's whole book is against the argument.

JUSTICE FRANKFURTER: That is a different point. I am merely going to the point that in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses. How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of competent writers.

MR. MARSHALL: Mr. Justice Frankfurter, I did not say that it was bad. I said that it would have been better if they had produced the witnesses so that we would have had an opportunity to cross-examine and test their conclusions.

For example, the authority of Hodding Carter, the particular article quoted, was a magazine article of a newspaperman answering another newspaperman, and I know of nothing further removed from scientific work than one newspaperman answering another.

JUSTICE FRANKFURTER: I am not going to take issue with you on that.

MR. MARSHALL: No sir. But it seems to me that in a case like this that the only way that South Carolina, under the test set forth in this case, can sustain that statute is to show that Negroes as Negroes--all Negroes--are different from everybody else.

JUSTICE FRANKFURTER: Do you think it would make any difference to our problem if this record also contained the testimony of six professors from other institutions who gave contrary or qualifying testimony? Do you think we would be in a different situation?

MR. MARSHALL: You would, sir, but I do not believe that there are any experts in the country who would so testify. And the body of law is that even the witnesses, for example, who testified in the next case coming up, the Virginia case, all of them admitted that segregation in and of itself was harmful. They said that

the relief would not *be to* break down segregation. But I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child.

Frankfurter Again Asks About Social Consequences

JUSTICE FRANKFURTER: Yes. But what the consequences of the proposed remedy are, is relevant to the problem.

MR. MARSHALL: I think sir, that the consequences of the removal of the remedy are a legislative and not a judicial argument, sir. I rely on Buchanan v. Warley, where this Court said that insofar as this is a tough problem, it was tough, but the solution was not to deprive people of the constitutional rights...

JUSTICE FRANKFURTER: Of course, if it is written into the Constitution, then I do not care about the evidence. If it is in the Constitution, then all the testimony that you introduced is beside the point, in general.

MR. MARSHALL: I think, sir, that so far as the decisions of this Court, this Court has repeatedly said that you cannot use race as a basis of classification.

JUSTICE FRANKFURTER: Very well. If that is a settled constitutional doctrine, then I do not care what any associate or full professor in sociology tells me. If it is in the Constitution, I do not care about what they say. But the question is, is it in the Constitution?

MR. MARSHALL: This Court has said just that on other occasions. They said it in the Fifth Amendment cases, and they also said it in some of the Fourteenth Amendment cases, going back to Mr. Justice Holmes in the first primary case in Nixon v. Herndon. And I also think--I have no doubt in my mind--that this Court has said that these rights are present, and if all of the people in the State of South Carolina and most of the Negroes still wanted segregated schools, I understand the decision of this Court to be that any individual Negro has a right, if it is a constitutional right, to assert it, and he has a right to relief at the time he asserts that right.

JUSTICE FRANKFURTER: Certainly. Any single individual, just one, if his constitutional rights are interfered with, can come to the bar of this Court and claim it.

MR. MARSHALL: Yes, sir.

JUSTICE FRANKFURTER: But what we are considering and what you are considering is a question that is here for the very first time.

MR. MARSHALL: I agree, sir. And I think that the only issue is to consider as to whether or not that individual or small group, as we have here, of appellants, that their constitutionally protected rights have to be weighed over against what is considered to be the public policy of the State of South Carolina,

and if what is considered to be the public policy of the State of South Carolina runs contrary to the rights of that individual, then the public policy of South Carolina, this Court, reluctantly or otherwise, is obliged to say that this policy has run up against the Fourteenth Amendment, and for that reason his rights have to be affirmed.

But I for one think--and the record shows, and there is some material cited in some of the amicus briefs in the Kansas case--that all of these productions of things that were going to happen, they have never happened. And I for one do not believe that the people in South Carolina or these southern states are lawless people.

But we do know, and the authorities cited in the Government's brief in the Henderson case, and, if you will remember, in the law professor's brief in the Sweatt case--the authorities were collected to show that the effect of this has been to place upon the Negroes this badge of inferiority. (44.,p.58-64)

Old Questions in New Context

Justice Reed raised several familiar questions and Mr. Marshall showed some clever footwork in answering them:

JUSTICE REED: In the Legislatures, I suppose there is a group of people, at least in the South, who would say that segregation in the schools was to avoid racial friction.

MR. MARSHALL: Yes, sir. Until today, there is a good-sized body of public opinion that would say that, and I would say respectable public opinion.

JUSTICE REED: Even in that situation, assuming, then, that there is a disadvantage to the segregated group, the Negro group, does the Legislature have to weigh as between the disadvantage of the segregated group and the advantage of the maintenance of law and order?

MR. MARSHALL: I think that the Legislature should, sir. But I think, considering the Legislatures, that we have to bear in mind that I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not. It is just a fact. But I assume that these are people who will say that it was and is necessary, and my answer to that is, even if the concession is made that it was necessary in 1895, it is not necessary now because people have grown up and understand each other.

They are fighting together and living together. For example, today they are working together in other places. As a result of the ruling of this Court, they are going together on the higher level. Just how far it goes--I think when we predict what might happen, I know in the South where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together.

JUSTICE REED: I am not thinking of trouble. I am thinking of whether it is a problem of legislation or of the judiciary.

MR. MARSHALL: I think, sir, that the ultimate authority for the asserted right by an individual in a minority group is in a body set aside to interpret our Constitution, which is our Court.

JUSTICE REED: Undoubtedly that passes on the litigation.

MR. MARSHALL: Yes, sir.

JUSTICE REED: But where there are disadvantages and advantages, to be weighed, I take it that it is a legislative problem.

MR. MARSHALL: In so far as the State is concerned, in so far as the majority of the people are concerned. But in so far as the minority--

JUSTICE REED: The States have the right to weigh the advantages and the disadvantages of segregation, and to require equality of employment, for instance?

MR. MARSHALL: Yes, sir.

JUSTICE REED: I think that each State has been given that authority by decisions of this Court.

MR. MARSHALL: And some States have, and others have not. I think that is the main point in this case, as to what is best for the majority of the people in the States. I have no doubt--I think I am correct--that that is a legislative policy for the State Legislature.

But the rights of the minorities, as has been our whole form of government, have been protected by our Constitution, and the ultimate authority for determining that is this Court. I think that is the real difference. (Emphasis Added)

As to whether or not I, as an individual, am being deprived of my right is not legislative, but judicial.

THE CHIEF JUSTICE: Thank you.

MR. MARSHALL: Thank you, sir. (44.,p.66-68)

Virginia and Delaware

After the arguments made before the Supreme Court in the Kansas and South Carolina cases, coverage of the Virginia and Delaware cases are relatively less important for the scope of this study. Few major points were made that were not included at the district court level. Neither of the last two hearings seemed to maintain the general interest on a dramatic level of the first two. Since the District of Columbia case was called up without a full hearing in a lower court it was argued only before the Supreme Court and that was reviewed in Chapter Six.

Some High Spots of the Virginia Case

The question of a class suit came up in the Virginia hearing:

JUSTICE REED: This is not a class suit is it?

MR. ROBINSON: Yes, it is: Yes, Your Honor. We brought it as a class suit on behalf of all Negroes similarly involved.

Later Justin Moore, representing the Board of Education of Prince Edward County pointed out to the court that the Virginia case was unique in two distinct ways:

"But we also found in comparing and getting the benefit of the Kansas and the South Carolina cases, which has just been heard, that these appellants had laid all this great stress on what they call the psychological issue. But we also found that there was quite a conflict of opinion among the experts on that matter."

So we undertook to prepare a full record, and your Honors would find, when you browse through this record that you have, instead of, as in the Kansas case where all of these teachers and educators and psychologists testified on one side, and in the South Carolina case on the appellants' side--you find a great array of very distinguished persons who testified in the Virginia case in direct conflict on this crucial question of fact.

So the first distinctive feature is the fuller record.

The second distinctive feature is the difference in the findings of the Court.

The Court, in contrast to the Kansas case, based upon the historical background in Virginia and upon all this evidence, found on the crucial questions which these gentlemen had stressed so much that they failed to prove their case, even on that point.

That is one of the main distinctive features in this case.

There also will be presented the difference as compared to the Kansas case, as to the great impact that would result in Virginia from a sudden elimination of segregation." (52.,p.31)

The testimony of the two groups of witnesses was dealt with above. Mr. Moore attacked the testimony of Dr. Chein, especially.

One of the most interesting witnesses was Dr. Chein. He has written a great deal on this subject, and he testified as to a questionnaire that he had sent out to some 850 social scientists, he said, asking them two main questions: first, as to whether or not in their view segregation was harmful to those segregated; secondly, was it harmful to those who did not segregate, and he said that the replies he got were some 500, and that some 90 per cent of the people who answered said that it was bad on both groups.

We showed on cross-examination and otherwise that there were some six or eight thousand persons who were eligible to have that questionnaire sent to them; we showed that only thirty-two came from south of the Mason and Dixon line, and he was unable to show a single one from Virginia, and what you wind up with is that you get a statement in the air as sort of a moral principle--it is kind of a religious

statement that you got--that, in principle or in theory, in the abstract that segregation is a bad thing to have...

We say it does not mean a thing except as a matter of stating something in the abstract. You might as well be talking about the Sermon on the Mount or something like that, that it would be better--

JUSTICE FRANKFURTER: It is supposed to be a good document.

MR. MOORE: Well, I say you might as well be asking people whether it is desirable for everybody to try to live according to the Sermon on the Mount as to ask them the kind of questions that they had put to them.

Now, let us look for a moment at the experts we called. We had eight people who testified, who were especially familiar with conditions in Virginia and in the South.

We started at the lower level with the superintendent of education, Mr. McIlwaine, who had been the superintendent for over thirty years in that very area.

We then moved up to the next level. We took the present superintendent of education of the state, Dr. Howard; we took the superintendent, Dr. Lancaster.

Then we moved up to the university level. We took Dr. Stiles, who has had this broad knowledge and experience all over the country, as the head of the department of education... (52.,p.52-53)

Among his own experts, Mr. Moore referred to Dr. *Henry* Garrett as his "Star Witness":

--our friends like to chide us with the fact that our star witness was Dr. Garrett--they would have given their right eye to have gotten Dr. Garrett. He happened to be the teacher in Columbia of two of their experts, the very Dr. Clark who made these doll tests, and who studied under Dr. Garrett.

Dr. Garrett, it so happened, was born and raised very near this very place where this controversy arose in Virginia. He was educated in the Richmond public schools and at the University of Richmond, and then he went on to Columbia, and finished his graduate work, and for years has been a leading professor of psychology, years the head of the

department of psychology, with some twenty-five professors and assistant professors under him, with wide experience as an adviser to the War Department in connection with the psychological tests among soldiers during the war.

I have not time--my time is going by so fast, I see it is almost gone--and I must read you one or two things about what Dr. Garrett said about this thing.

He said this. He said:

"What I have said was that in the State of Virginia, in the year 1952, given equal facilities, that I thought, at the high school level, the Negro child and the white child--who seem to be forgotten most of the time--could get better education at the high school level in separate schools, given those two qualifications: equal facilities and the state of mind in Virginia at the present time.

"If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me that he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group."

Then he says again:

"It seems to me that in the State of Virginia today, taking into account the temper of its people, its mores, and its customs and background, that the Negro student at the high school level will get a better education in a separate school than he will in mixed schools." (52., p.54-55)

After Mr. Moore had argued that the segregation issue was primarily legislative rather than judicial, Justice Jackson asked about the implication of possible congressional action.

JUSTICE JACKSON: Suppose Congress should enact a statute, pursuant to the enabling clause of the Fourteenth Amendment, which nobody seems to attach any importance to here, as far as I have heard, that segregation was contrary to national policy, to the national welfare, and so on, what would happen?

MR. MOORE: Your Honor, we thought of that in here, and that is a big question, as you realize.

JUSTICE JACKSON: That is why I asked it.

MR. MOORE: Our view of the matter is that it should not be held valid in this court; that the only effective way to accomplish that is to be done through an act of Congress, which would be by amending the Constitution.

JUSTICE JACKSON: You think that the Fourteenth Amendment would not be adequate to do that?

MR. MOORE: We do not believe so, and I have not the time and I have no desire to engage in this very interesting discussion that Justice Burton and Justice Frankfurter engaged in, as to whether there is any difference through the passage of time and through progress which has been made between the commerce clause and the Fourteenth Amendment.

We believe, as Mr. Davis pointed out this morning. I think touching this same point, although very slightly, that the Fourteenth Amendment here should be viewed in the light of what was really intended, and what was understood by Congress and by the legislatures at that time.

JUSTICE FRANKFURTER: But Justice Jackson's question brings into play different questions and different considerations, Mr. Moore, because the enabling act of the Fourteenth Amendment is itself a provision of the Fourteenth Amendment; patently Congress looked forward to implementing legislation; implementing legislation patently looked forward to the future, and if Congress passed a statute doing that which is asked of us to be done through judicial decree, the case would come here with a pronouncement by Congress in its legislative capacity that in its view of its powers, this was within the Fourteenth Amendment and, therefore, it would come with all the heavy authority, with the momentum and validity that a congressional enactment has.

MR. MOORE: That may be so, your Honor, but that is another case.

JUSTICE FRANKFURTER: That is a good answer.

MR. MOORE: Yes, it is another case.

JUSTICE JACKSON: I wonder if it is. I should suppose that your argument that this was a legislative question might have been addressed to the proposition that the enforcement of the Fourteenth Amendment, if this were deemed conflicting, might be for ~~the~~ Congress rather than for this Court. I would rather expect and I had rather expected to hear that question discussed. But you apparently are in the position that no federal agency can supersede the state's authority in this matter which, I say, you have good precedents for arguing.

MR. MOORE: Your Honor will appreciate that you have asked a question that to try to answer adequately requires a lot more time than I have got. (52.,p.58-60)

Later, Justice Douglas questioning Spottswood Robinson, the appellant's attorney, approached the same point from the other direction.

JUSTICE DOUGLAS: Has the Court ever held that the Fourteenth Amendment is not executed unless Congress acts?

MR. ROBINSON: No, I do not think so. (52.p.71)

The Attorney General of Virginia, Mr. Almond, closed a rather brief appearance by reviewing the new Negro facilities to be available the following September and pointing out that Virginia was different:

But here there is a distinction, if Your Honor please, with 22.7 per cent of our (state) population, the Negro population, ~~with~~ 59 per cent of the school population of Prince Edward County Negro population, to make such a transition, would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep.

One of Attorney General Almond's most startling arguments, one partially fulfilled by later events in Prince Edward County, was that forced integration would destroy a steadily improving public school system:

MR. ALMOND: I just want to say a word, if Your Honors please, relative to the impact of a decision that would strike down, contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races.

We have had a struggle in Virginia, particularly from 1920 on, to educate our people, white and colored, to the necessity of promoting the cause of secondary education.

We think we have had great leaders to develop in that field. One, Dr. Dabney Lancaster, now president of Longwood College, I think, made himself very unpopular because he advocated and fought tooth and nail for the equalization of salaries between white and Negro teachers.

That has been accomplished. The curricula have been accomplished; facilities are rapidly being accomplished, and our people, deeply ingrained within them, feel that it is their custom, their use and their wont, and their traditions, if destroyed, as this record shows, will make it impossible to raise public funds through the process of taxation, either at the state or at the local level, to support the public school system of Virginia, and it would destroy the public school system of Virginia as we know it today. That is not an idle threat.

THE CHIEF JUSTICE: General, in what way will it destroy--

MR. ALMOND: It would destroy it, Mr. Chief Justice, because we must have--it is a costly proposition--money with which to operate the public school system at both the state level and the local level, and the only source of income, of course, is the source of taxation at the state and local level, and bond issues at the local level, and the people would not vote bond issues through their resentment to it.

I say that not as a threat.

Then, another thing, we have 5,243 Negro teachers in the public school system of Virginia on an average of splendid qualification. That 5,243 exceed the Negro teachers in all of the 31 states of this Union, where there is not segregation by law.

They would not, as a hard fact of realism, and not in a spirit of recrimination do I say this, but simply as hard stark reality--those Negro teachers would not be employed to teach white children in a tax-supported system in Virginia. (52.,p.69-71)

Mr. Robinson, in his rebuttal argument on behalf of Davis, pointed out that prior to the Civil War, as a consequence of the Dred Scott decision, the Negro did not enjoy citizenship rights equal to those enjoyed by a white person. He reminded the Court of the "Black Codes" (a body of laws which expressly intended and accomplished the disability of the Negro). An examination of the records of the Constitutional Conventions of the Southern States

gives a reliable indication of the real basis for the beginnings of legislative segregated education. It was intended to, and had, in fact, limited the educational opportunities of the Negro; placed him in a position where he could not obtain, in the state's educational system, opportunities and benefits equal to those which were given to white students. He pointed out that although Negroes constituted 26 per cent of the total number of pupils enrolled in the schools, they did not receive, when measured on a dollars and cents basis, anything like their fair share of the school property employed by the state in its educational program.

He pointed out that even if the four-year program was completed, the amount invested in sites and buildings would only be 79 cents per Negro student for each dollar for white student. And, the money is not yet available. Mr. Robinson concluded that it was his position that Negroes are entitled to relief immediately, just as soon as expeditious administrative arrangements could be made to desegregate the schools. (52.,p.72-88)

Segregation Per Se in Delaware

The Delaware case presented the Supreme Court with two lower court opinions, both of which found in favor of the Negro. The Court of Chancery, on the basis of testimony given by expert witnesses, had found segregation per se resulting in inferior education. While discussing this case with us, Kenneth B. Clark made the following remarks:

Well, I think there were two cases that provided the closure on the Court--the Topeka case, which made quite clear the issue of inherent inequality with segregation without regard to the quality of facilities, and the Delaware case. The Delaware case is generally forgotten. But to me it was critical because that was the only case that we won on the trial level...There, the Chancellor ruled that because of the inequality, the Negro plaintiffs would have to be admitted to white school-- (22.)

The Delaware Supreme Court, while still deciding for the Negro, ruled that the segregation per se argument was immaterial to its final conclusion. (54.) Separate but unequal was the ground upon which the Negroes won the case. There was a considerable amount of dismay and confusion in Delaware as a result of the lower court opinions. It seemed obvious that whenever facilities were equalized, the Negroes would again be subjected to the segregated system.

Justice Frankfurter pointed out that, since the Delaware Supreme Court had not decided on the issue of segregation per se, the U.S. Supreme Court was not called upon to review that principle either. (55.,p.25)

Nevertheless, Justice Black brought attention to the idea that equal educational opportunity involved more than simple equality of physical facilities when he questioned Mr. Young, Attorney General of Delaware:

JUSTICE BLACK: But you still have your finding that, so far as Delaware is concerned (and I presume he was not looking at evidence anywhere but Delaware) that the system of segregation there, even though the facilities, physical facilities, are equal, results in inferior education for them...I find from the evidence that (the Negroes) do not (get equal opportunity for education) because the relationship that exists here, and by reason of the manner of going to school, and the mixture in other places, and so forth, I find that the effect on the children is that they get an inferior opportunity for education. Would you say that that would still not bring them within the separate but equal doctrine?

MR. YOUNG: I would, Your Honor. I would because I say that would be violative of the equal protection clause of the Fourteenth Amendment, and would also be violative of our own constitutional provisions, because we are assuming now facilities being equal, educational opportunities being equal; I would like to say I do not know what evidence Your Honor is referring to that the chancellor could rely on other than the sociologists and anthropologists and psychologists. (55.,p.26-27)

It is interesting to note that Mr. Young for Delaware was unimpressed by the evidence of the behavioral sciences, while Mr. Moore for Virginia was basing his case on the testimony given by his own expert witnesses in those fields.

The Five Questions

The first hearing before the Supreme Court had been held on December 9, 10, 11, 1952. On June 8, 1953, the Supreme Court asked both sides and the U.S. Attorney General to prepare for reargument (rescheduled for December 7, 8 and 9, 1953). The Court posed five questions. The first two dealt with the intent of the framers of the Fourteenth Amendment, the Congress which submitted it and the states which ratified it. The third question dealt with judicial power to abolish segregation. The last two dealt with possible procedure and timing of the desegregation process if the case was so decided. (The complete questions are included in the Appendix.)

A New Chief Justice

The five questions were asked by the Court under the leadership of Fred M. Vinson; but one month before the opening of the October term (1953), Mr. Vinson died.

It fell to President Eisenhower to appoint a new Chief Justice. A President undoubtedly feels compelled to take many factors into consideration in selecting a Chief Justice. Nominally a Republican, Earl Warren's popularity had enabled him to win repeatedly the nomination for Governor on both tickets in California. Among other political reasons important to the Eisenhower administration was probably the desire of Senator William Knowland and Vice-President Nixon to have the popular and liberal Earl Warren out of the political picture in California. Whatever the President's reasons, Warren's own political and social philosophy were probably not among them. (2.,p.87) Ex-President Truman apparently understood Mr. Warren as well as anyone. He said simply that Warren was a Democrat but didn't know it.

Since Congress was not in session, the President felt obliged to make an interim appointment. With only a few days notice, Earl Warren took the oath of office on October 5, 1953. After five months of considerable senatorial "discourtesy" on the part of a few members of the Judiciary Committee, Earl Warren was confirmed as Chief Justice, March 1, 1954, forty-eight days before he was to render the school segregation decision.

Rearguments

When the cases were opened for rehearing on the five questions in December, 1953, each case was again heard separately. Ostensibly, the purpose of the rehearing was to examine the questions posed by the Court in June and the arguments of South Carolina and Virginia proceeded along those lines. But when Robert Carter opened on behalf of Oliver Brown in the Kansas case, matters took a different turn.

In September, 1953, the school board of Topeka adopted a voluntary plan of desegregation for its schools. The plan called for a four-step, gradual process of desegregation. The first step, to be undertaken that Fall, eliminated segregation in two geographic school areas of Topeka, sending nine Negro students into integrated schools. One of the nine students was an appellant in Brown v. Topeka.

Reports about this voluntary action of the school board reached Washington and apparently one member of the Court asked Charles Hallam, then Associate Librarian of the Supreme Court Library, to secure more information. Consequently, a letter (reprinted on the following page) over Mr. Hallam's signature

LIBRARY
SUPREME COURT OF THE UNITED STATES
WASHINGTON 13, D.C.

September 17, 1953

Mr. Jacob Dickinson, President
Board of Education
Topeka, Kansas.

Dear Mr. Dickinson:

A newspaper dispatch from Topeka, Kansas, dated September 4, relating to the adoption by your Board of a resolution to terminate segregation in the elementary schools of Topeka has brought forth a request to us, to which we ought if possible to respond, for authoritative information on the subject. In particular, we have been asked to obtain the full text of the resolution and the report (if any) on which the Board's action was based; the statement made by Mr. M. C. Oberhelman, dissenting member of the Board, and those of any other Board members, if available; and clippings from, or references to, newspapers showing the public's reaction to the resolution.

We would appreciate it greatly if you could make these documents available to us or indicate where we might obtain them, as well as any other materials on ending segregation in the public schools in your city or state.

Sincerely,

/s/ Charles Hallam

Charles Hallam,
Associate Librarian.

was sent to J.A. Dickinson, president of the Topeka Board of Education, asking for more detailed information. Mr. Dickinson replied with copious material relating to the newly adopted policy of the school board. The object of the inquiry became clear when the case reopened in December.

Mr. Carter began by routinely identifying the appellants and the Kansas statute, ~~the constitutionality of which~~ the constitutionality of which they were challenging. After only three sentences of this introduction, Justice Frankfurter asked, "Is your case moot, Mr. Carter?"

Obviously somewhat nonplussed, Mr. Carter replied, "I had hoped to get a little further into the argument before that question was asked." (laughter) (49.p.2)

The point was critical. Should the Kansas case have been dropped because of mootness, with it would have gone a large body of expert testimony regarding the detrimental effects of segregation and a District Court opinion which recognized the harmful consequences of segregation per se.

Mr. Carter countered the question about mootness by showing that although one of the appellants in the case was indeed attending an integrated school, the others were not. Neither were the large majority of Negro elementary students of Topeka. Furthermore, there was no time limit set by the school board as to when the rest would be integrated. He also maintained that since the Kansas statute permitting segregation still existed, the plaintiff's case also still existed.

Yet, the Topeka school board had not appeared to defend the case and its action to desegregate "as soon as practicable" indicated an intention to give the Negroes what they wanted. Justice Frankfurter stated, "That is what I call a moot case." (49.,p.4)

In order to defend the state statute, Paul E. Wilson, Assistant Attorney General of Kansas, also claimed the case was not moot. Under the state statute, the first-class cities still had permission to determine whether they would or would not have integrated schools. Topeka was merely one city exercising its prerogative. Therefore, the Attorney General's office considered that the constitutionality of the statute was still in question.

Undoubtedly the contention by Wilson that the statute still needed defending helped Brown v. Topeka survive the question of mootness. When he was asked about the Topeka school board action and the question of mootness in our interview, Mr. Wilson expressed

belief that much more than the statute contributed to the validity of the case. He said:

...The Topeka Board of Education announced a policy to eliminate segregation from public schools. They announced an intent, they did not desegregate completely and I think frankly that this was largely a political maneuver, because a great deal was made of the announcement but actually very little was done to implement it ...this is like a wife suing her husband for divorce because he beats her and he says he's going to stop sometime in the future. But at any rate, this question certainly rose in the argument...so long as segregation was being maintained and there was implicitly an assertion of right to maintain segregated schools, I think the question was very real. (40.)

In the Supreme Court, the question was discussed at length, mostly by Mr. Carter and Mr. Wilson in answer to queries from Justice Frankfurter. Finally, Earl Warren settled the matter abruptly: "I think when both parties to the action feel that there is a controversy, and (we) invited the Attorney General to be here and answer these questions, I, for one, would like to hear the argument." (49.p.18)

So, Brown v. Topeka survived the showdown and was still very much alive. Mr. Wilson launched into his study of the intention of the framers of the Fourteenth Amendment. Mr. Carter closed with an assertion of the willingness of the people of Kansas to abide by the decision should their statute be invalidated by the Supreme Court.

Yes...No...Maybe

The first three questions, particularly, represented the lawyer's traditional approach to such an issue. Was the Fourteenth Amendment intended to abolish segregation in the public schools? As Mr. Marshall put it, a stack of brochures, "as high as a desk" was prepared by the Appellants, the Defense and the Attorney General's office. He recalled the day this question was coming before the Court. In an informal conversation, his chief opponent, John W. Davis said to him, "My brief says positively 'No'. Your brief says positively 'Yes'. The government brief tells the truth--nobody knows. (32.)

In summary, Mr. Davis elaborated on a higher oratorical level to the amusement of the Court:

After so prolonged a study, as has evidently been made, it does seem rather a lame and impotent conclusion, not calculated to be of a great deal of help to the Court, and I think the cause of that despair on the part of the learned Attorney General and his aids, is that they have fallen into the same fallacy into which the Appellants have fallen. They endeavor by collating all that was said on either side whenever the question raged, and it was not a single instance--they hope out of that to distill some matter that will exhibit what can fairly be called the Congressional intent.

It is no wonder, that having plunged into that Serbonian bog, they are in a state of more or less despair when they are able to emerge.

Now, Your Honors then are presented with this: We say there is no warrant for the assertion that the Fourteenth Amendment dealt with the school question. The Appellants say that from the debates in Congress it is perfectly evident that the Congress wanted to deal with the school question and the Attorney General, as a friend of the Court, says he does not know which is correct. So Your Honors are afforded the reasonable field for selection. (Laughter) (45.,p.66)

Mr. Davis then shifted the ground of argument to what the action of Congress demonstrated rather than what various members had said.

In our interview, Mr. Marshall also found amusement and frustration in the many efforts to weigh Congressional intent regarding the Fourteenth Amendment:

No, the stuff wasn't there. What we could have done with a computer! But we didn't have it. Nobody thought of it, anyhow. But Senator Jones today said 'Yes'. Senator Jones a week later said, 'No'. Senator Jones three weeks later said, 'Maybe'. Well, we decided the only way you could make any sense out of that is to measure--three inches in Yeah's, two inches in No's, just like this, and store it some place and later add it all up. And he will come out a hundred and eighty-seven inches Yeah's and a hundred and ninety-two inches No's. Therefore, he's a 'No' man. But I'll tell you about the politicians back in those days. The same guys would flip-flop, flip-flop, flip-flop.

Davis' boys, my boys and the government boys, couldn't get anything better than an argument...Nobody could say conclusively...It just wasn't there...You just couldn't show it...

I suspect it was Justice Black...he must have concluded it was there. I feel it was a fairly good conclusion. Indeed, when we started out we said, 'Well, one or the other is going to lose on this one.' We couldn't find enough to put it in there. And Davis didn't either. But that was a lot of research. Those monographs definitely covered it. We didn't have a single second-rate job, I believe, out of a hundred--close to two hundred people who worked on it.

We had instances where I had two guys working on a phase and deliberately brought their professor in to ride herd on them...Two fellows in California were the most interesting couple to umpire an argument with. They'd fly at each other's throats on anything...They could argue like mad...One was practically blind and the other stone deaf. If they both had all their faculties I don't know what would have happened.

Marshall did the research from the Reconstruction period to the present himself: "I just took each volume of the Supreme Court Reporter and went to the digest for each case on the Fourteenth Amendment. It took about two months. It turned out to be a complete waste of time. I got nothing out of it." (32.)

Justice Frankfurter had also done considerable research on the historical questions. Among his papers in the Library of Congress is an unsigned "Memorandum for the Conference" with the typed initials "F.F.", dated December 3, 1953, four days prior to the second hearings. The memorandum states:

Having become convinced of the unreliability of the most quoted account of the history of the Fourteenth Amendment, I had one of the most dependable of the law clerks I have had, Alexander Bickel, devote many weeks at the last Term to the reading of every word in the Congressional Globe relating to the history of what ultimately became the Fourteenth Amendment, including therefore also the history of related measures. The result of Mr. Bickel's labors, as edited by me, is embodied in the attached memorandum, which my brethren may care to read. I regard it as a fair, well-balanced

summary of the story. The memorandum indicates that the legislative history of the Amendment is, in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the public schools or authorized legislation to the end, nor that it manifested the opposite. (Emphasis Added)

During his interview, Charles Thompson summed up quite succinctly the whole matter of Congressional intent regarding education:

It was simply a fact that there was conflicting evidence as to whether the founding fathers had this in mind at all. (38.)

The Government's Stand

Since the U.S. Attorney General was asked to participate in the case, the attitude of the Administration came into the picture. Political strategy of the Republican party was a factor the Attorney General's office probably had to consider. But the Republicans themselves were divided over the problem of winning white support in the South and the Negro vote in the North.

As noted above, the Government brief said the intent of the Fourteenth Amendment on education was inconclusive. The brief probably required Eisenhower's approval, which may account for its cautious stand. However, the Attorney General anticipated a direct question from the Court during the oral argument and gave Assistant Attorney General Rankin permission to make a direct statement against segregation. Apparently, Eisenhower did not object. (10.p.27)

On the last two questions posed by the Court regarding implementation of a decision, the Government said in its brief:

If the Court holds that the laws providing for separate schools are unconstitutional, it should remand the instant cases to the lower courts with directions to carry out the Court's decision as the particular circumstances permit. (Emphasis Added) (50.)

Again, "proceed with caution" seemed to be the Government watchword.

A Target That Wasn't There

The undeveloped status of public education in 1868 became an important consideration to Chief Justice Warren after the rehearing on the intent of the Fourteenth Amendment. He reasoned that since education was almost non-existent for Negroes at that time, "It is not surprising that there would be so little in the history of the Fourteenth Amendment relating to its intended effect on public education." In his interview with David Atkinson, the Chief Justice noted that neither in 1868 nor even in 1896 was there a system of public education in existence in the South. (18.)

To put it simply, the Fourteenth Amendment could hardly point to a target that was not there. Arguments about history and precedent and intent seemed largely futile.

In the final opinion, the Chief Justice said, "This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive." (49.)

Even during the inconclusive debate on the intent, Mr. Marshall took the opportunity to emphasize the main issue at stake when he seized upon a remark by Mr. Davis:

As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige. Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in *Strauber v. West Virginia*, which is the same status as anybody else regardless of race. (45.,p.130)

The Unanimous Decision

The Supreme Court agreed to hear the first desegregation case in June, 1951. Four years later, on May 17, 1954, "The Case of the Century" was decided unanimously. In its one-hundred-seventy-five year history, the Supreme Court has reversed itself only about one hundred times. In the past two decades, that rate has been accelerating. The NAACP lawyers had suggested a way around direct reversal but the Court met the issue head on. It said the separate but equal doctrine had no place in public education.

"Everybody was shocked when it was unanimous. I can bet you that," Thurgood Marshall said. He explained that on one occasion during the waiting period:

We thought we had it lock, stock and barrel. Mr. Justice Black (a sure bet) took off (on a vacation) ...a guy tipped us off that he sent for all the briefs...which were put in a separate brief case... We all said "Ah-ha". We know now we are going to win and we know who's going to write it. Boy, the rumors that we got on that thing.

During the interview we had this further dialogue on the unanimous decision:

DR. SPEER: There has been quite a bit of speculation that Chief Justice Warren held out and used all his powers of persuasion to make it unanimous, knowing that it was going to arouse so much controversy.

MR. MARSHALL: He hadn't been there for so long.

DR. SPEER: Of course, maybe he was still in his honeymoon period.

MR. MARSHALL: Yeah. Well, when you get into the conference room, the Chief's got a vote.

DR. SPEER: One man, one vote.

MR. MARSHALL: That's all he has. That's all he has.

DR. SPEER: But he presides and has a little more opportunity to persuade if he wants to.

MR. MARSHALL: That's what I think it is. I think your word "persuasion" would be it. I don't think there was any possibility of arm-twisting on it. I don't think you can. I don't think you can. I don't think anybody can. It's sheer persuasion in that room, once you read all that stuff and go in there. We are also interested in the fact that it was never put on the docket, the conference room docket, so you'll never be able to show when it was decided.

DR. SPEER: Probably not on just one Friday afternoon?

MR. MARSHALL: Probably...(32.)

A memo to the members of the court, dated May 7, 1954, and initialed by Earl Warren, is among the Frankfurter papers in the Library of Congress. Apparently consensus had been reached at this time because the drafts attached to this memo were very nearly the same as the decisions in the final form. The memo is included below: (Emphasis Added)

May 7, 1954

TO THE MEMBERS OF THE COURT:

As suggested by the Conference, I submit the attached memorandum as a basis for discussion of the segregation cases.

It seemed to me there should be two opinions -- one for the state cases, and another for the District of Columbia case. Also, because of the divergent conditions calling for relief and because this subject was subordinated to a discussion of the substantive question in both the briefs and oral argument, the cases should be restored to the calendar for further argument on Question IV and V previously submitted by the Court for the reargument this year. It also occurred to me that ~~we might appropriately invite the Attorney General of the United States~~ we might appropriately invite the Attorney General of the United States and the Attorneys General of the States requiring or permitting segregation to present their written and oral views should they desire to do so.

The memos were prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.

E.W.

The text of the decision will be found below. The reader will note that the tone of the opinion conforms in all respects to the aims set forth by the Chief Justice in the last paragraph of the memo. The copious footnotes are excluded since they are repetitious of this study. There has been much controversy over the wording and the basis of the decision. By some, it has been considered as belonging among the great Anglo-Saxon documents of liberty. It has also been labeled a "weak" opinion, representing a low common-denominator. Some discussions of the opinion indicate that the disputants may not have recently read the full text.

BROWN V. BOARD OF EDUCATION

May 17, 1954

Mr. Chief Justice Warren delivered the opinion of the Court.

"These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

"In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of the community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their white superiority to the Negro schools.

"The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

"An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

"In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

"In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

"In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '...his ability to

engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial (ly) integrated school system.

"Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

"Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question--the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on

Questions 4 and 5 previously propounded by the Court for the re-argument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered."

How could a court with a record of so many divided votes get together unanimously on such a difficult case? The carefully guarded privacy of the conference room and the other confidential procedures surrounding the Supreme Court make the question difficult to answer. But there are bits of information that can be pieced together as a basis for interesting speculation. Black and Douglas with consistent voting records on cases involving human rights and individual liberties had dissented on even remanding the South Carolina case. They voted to hear it on the basis of segregation per se. Burton and Minton had joined them to provide the four votes necessary for certiorari on the public school cases. Chief Justice Warren told David Atkinson, "There was never any question about Shay." (Sherman Minton)¹ (18.)

Thurgood Marshall said, "I know the man I suspect was a long hold out was Mr. Justice Reed...I don't see how anybody could hold out as long as he did?"

DR. SPEER: Just because of his voting record?

MR. MARSHALL: His questions and you get a sort of feeling. (32.)

¹David Atkinson relates two stories from his interview with Chief Justice Warren which are apropos here. Mr. Warren was a close friend to Justice Minton. After Minton retired, Mr. Warren urged him to return to Washington occasionally so they could attend football games together. Minton declined and Warren felt it may have been because of his sensitive feelings about being in a wheel chair. "But I would have pushed his wheel chair," explained the Chief Justice.

With obvious delight, Mr. Warren told of an experience that Justice Minton had in Georgia. He and his wife were driving on the highway from "Atlanta to the Sea" along the old General Sherman route. A state trooper stopped him for speeding and the following conversation ensued:

The Trooper: What is your name?
Mr. Minton: Sherman Minton
The Trooper: What's that again?
Mr. Minton: Herman Minton
There was no ticket.

One distinguished law professor in good position to know told me that at least one member of the Court planned to dissent, Mr. Justice Jackson. He had prepared a rough draft of his opinion which one day is expected to be available. Justice Jackson was hospitalized for some time prior to May 17, 1954. The Chief Justice called on him in the hospital and must have persuaded him to go along for a unanimous court.

When David Atkinson mentioned Jackson and Frankfurter in this context to Chief Justice Warren, indicating that both of those Justices seemed more cautious than Minton and himself, the Chief Justice agreed and nodded gravely. He added that Minton reached a point by a straight line. But by drawing a circle in the air around an imaginary point, he indicated that this was the way Frankfurter got to it. (18.)

Justice Frankfurter was a key man, strong minded and influential. From his many questions and comments during the hearings and his past opinions it seems probably that he held three definite positions: 1) his feelings were on the side of the Negroes and desegregation; 2) he was reluctant to overthrow past Supreme Court decisions and, as he said during the hearings, a long series of customs and lower court decisions; 3) he was concerned about the possible social upheavals that would follow desegregation. The NAACP lawyers no doubt were deliberately shaping their arguments in a way they hoped would help him through his dilemma and into their camp.

The following memorandum to his fellow Justices found in the Frankfurter papers in the Library of Congress gives one clue to the Frankfurter thinking:

"April 14, 1965

Dear Brethern:

Hamilton Basso is, as I dare say you know, a very perceptive Southern writer and carries weight, I believe, both North and South respect him for his views on the relations between North and South. A letter of his in last Sunday's New York Times had for me the persuasiveness not of novelty but of emphasis. Believing as I do that how we do what we do in the Segregation cases may be as important as what we do. I am venturing to put before those of you who did not see it in Mr. Basso's letter. (Emphasis Added)

F. F."

As noted in Chapter Eight the "all deliberate speed" phrase is generally attributed to Justice Frankfurter. Such wording naturally would ease his concern about the consequences.

As Dean of the Howard Graduate School at the time, Charles Thompson was in off-the-record communication with several Justices. When I said in our interview that I had heard considerable speculation to the effect that Frankfurter had held out and insisted on "deliberate speed", Mr. Thompson felt too bound by confidences to give a full answer, but replied, "I can say that that is good speculation." (38.)

There can be no doubt about the attitude of Earl Warren. His record as a liberal Governor, his courage in resisting the McCarthy pressures on the University of California and his public statements all point to a positive position. So do his subsequent opinions.

Warren Replacing Vinson--The Critical Difference?

Had Vinson lived through 1954 would the decision have been the same? Probably not.

When I asked Thurgood Marshall if Warren's coming to the Court made a difference, he said, "Sure, sure, sure." He went on to explain that the reason he was sure was the difference in the attitude between the two Chief Justices on the restricted covenant cases (dealing with real estate contracts). He added, "Oh, yes, if he (Vinson) had still been there we would have had some trouble." (32.)

As indicated by their questions and comments, a number of the Justices showed concern about the social impact of such a decision. If segregation was to be abolished, the solidarity of a unanimous Court was important for public reaction. With Warren coming to the Court five votes seemed altogether sure. Frankfurter was given a way out, making six. Jackson, a sick man, gave in to the Chief Justice. Desegregation had a clear majority. The most reluctant two or three finally concurred.

CHAPTER VIII

THURGOOD MARSHALL AND HIS FRIENDS

Perspectives and Personalities

Thurgood Marshall has been the most prominent figure in the desegregation litigation for the past twenty years. He plead the Oklahoma, Texas and South Carolina cases and led the legal staff which planned and argued the five public school cases in the three hearings before the Supreme Court.

In naming Mr. Marshall as an Associate Justice in June, 1967, President Johnson pointed out that few if any men ever had such an impressive batting average in arguing cases before the court prior to their appointment. Thurgood Marshall had won forty-four out of fifty-two cases. Nineteen were argued for the government as Solicitor General and thirty-three for the NAACP or in private practice, many of them civil rights cases with weak financial backing.

On April 3, 1967, when he was Solicitor General, Mr. Marshall granted me an interview at the Department of Justice. I was quickly struck by his informality, charm, frankness, humor and quick clear logic expressed in simple language. He readily consented to a tape recorder. When I asked about any stipulation on the use of the recording he replied, "Anytime I talk, it's public."

When I asked Mr. Marshall if he considered Brown v. Topeka his greatest case, he said, "Nope, it's that Security Exchange Commission case there on my desk which I argue *before* the Supreme Court Monday. It's always the next case." That attitude is probably one secret of his success.

More basically his winning so frequently for unpopular causes probably comes from his mastery of law and logic. He has become a legal scholar by the combination of formal study and a great deal of intimate experience in front line constitutional cases. He has all the dignity and sobriety of the judicial stereotype when a conventional situation calls for it. But he has something more--a unique, quick, clear reasoning that comes natural to him. He can cut through a *foggy* maze of semantics, irrelevancy, legalisms and technicalities to the substantive meaning of the Constitution. His humor is often disarming. He has an uncanny ability to reduce key issues to simple arguments that leaves his opposition helpless and probably a bit ashamed.

Isn't That Somethin'

At the second hearing before the Supreme Court the question of mootness came up almost immediately in the Topeka case because the new Board of Education had made a modest start on a gradual desegregation process. (See Chapter Seven)

Charles Hallam, associate librarian for the Supreme Court had written to Jacob Dickinson, board president at Topeka for information, apparently at the request of one of the Justices, probably Frankfurter. I showed a copy of the letter to Mr. Marshall. He read it carefully and said, "Isn't that somethin'?"

After some discussion, Chief Justice Warren ruled that the case should be heard in spite of the later developments at Topeka. But here was a letter indicating an unusual inquiry by the Court which brought an answer that might have made the Topeka case moot and affected the final decision.

Later, Mr. Marshall called the library of the Supreme Court. He said that the letter would be a good entree to Mr. Hallam, now the librarian. Mr. Hallam did not remember the circumstances of the letter. He and his staff were most courteous and cooperative even to the extent of lending me three big volumes of the arguments before the Supreme Court with permission to have them copied.

People, Pencils and Coffee

There was little money on the side of the NAACP. Thurgood Marshall described their economic condition in his characteristic way: "We were broke in those days...One man has never been convinced that I did not have a big slush fund tucked away some place. I have never convinced him. He always says, 'O.K., O.K., let's put it this way, nobody's found it yet.' I say, 'Yes, including me.'"

But in this instance, the shortage of money was not a hopeless impediment to the cause of justice. By 1952, the NAACP had attracted an abundance of free volunteer help. Again, the situation is best described in the spontaneous words of Mr. Marshall as he summed up the five years of litigation in the segregation cases:

A Negro reporter who hung around the office estimated the number of people, pencils and cups of coffee involved. The figure was unbelievable.

We began by getting law school professors to testify, and once we got them in the Texas case (we got good ones) then

everybody wanted to volunteer...The number of lawyers and law professors who worked on the case was close to a hundred (80%) white ...I turned down ten for every one who worked...Many of these lawyers...were in government service. I call that 'moonlighting for free'. Most of those people (witnesses) sent back the money we gave them for expenses. They wanted to pay for the expenses.¹

There was difficulty in finding a lawyer to help in one Southern state. Finally a colleague thought of a promising young lawyer and got his consent on one condition: "If I get your word and Mr. Marshall's on one thing--don't tell Papa." "Papa" was the governor. They promised. The promise was kept. "Did 'Papa' ever find out?" I asked. "Obviously, no," replied Mr. Marshall, "He inherited all of Papa's money."

"The Wild Boys"

All the way along, Thurgood Marshall enjoyed friendly relations and close communication with a number of distinguished law professors, especially of Harvard, Yale and Chicago:

MR. MARSHALL: In all these cases, the last night before the argument, I always ended with my secretary and two or three other lawyers and they would be Lou Pollack, now Dean at Yale, and Charlie Black, who's a professor at Yale (both of them are white) and Bill Coleman (who is a Negro). So you have a two to one average there...Dean Griswold (of Harvard) testified in every one of those law school cases but one. Ben Kaplan on their faculty has worked on practically every case I've ever had back to 1940. When I go to Harvard I would get about ten of the faculty to sit down with me, about the same number I had at Yale. But Harvard's teaching is conservative, the law school teaching. They teach by the law.

DR. SPEER: The Chicago group has been pretty liberal through the years?

MR. MARSHALL: Oh, boy! Wild!

DR. SPEER: Wild, huh? (Laughter)

¹There were naturally some social scientists who were reluctant to testify. Mr. Marshall told them, "Well, I know some very capable scientists who testify as experts everyday, for fifteen hundred dollars a day. You do not see anything wrong with that. But to testify for nothing--I said, 'Now I'm beginning to understand what's wrong with it, it's the nothing part'. Well, that was not the right thing to say. I am sure I realize it now, but you might be able to plow some of that out." (32.)

MR. MARSHALL: What I love is, I love to hear the Yale boys say, "Chicago's wild." You go out to Chicago and they call the Yale boys wild. I just say, "Both of you are wild. Both of you are wild."

Mr. Marshall also spoke with great appreciation of the "live witnesses" used to present the behavioral science arguments about the social and psychological evils of segregation. He singled out the late Dr. Robert Redfield, the distinguished anthropologist from the University of Chicago: "Oh, he was priceless." He attributes great importance to the role played initially by Kenneth Clark and the late Helen Trager.

He recalled another human interest story with a mixture of amusement and sympathy:

The brief for the Supreme Court had to be in Washington Monday morning. Sunday night, after six o'clock, it was discovered that in the footnotes the type was exactly reversed from what it should be...You set those by hand, not by linotype. Our printer did it, got it bound and off about four o'clock in the morning. And the next thing we heard about him--we called a day or so later about something--and the secretary said, "Don't you know where he is? He's in a rest home." The man had a nervous breakdown. I said, "I can understand what happened to him, I know what happened to him."

Appreciative of Huxman

I reminded Mr. Marshall that Judge Huxman of Topeka was the only judge from a lower court which Chief Justice Warren quoted directly in 1954. Then I referred to the following statement made by Judge Huxman in an interview a few months earlier:

I was glad to present the question to the Supreme Court so there wouldn't be any doubt. I wanted it decided once and for all, one way or the other... The Supreme Court had ducked (the issue)...Well, I intended to put the question up there so they'd have a little difficulty getting around it. (29.)

MR. MARSHALL: (Gleefully slapping his knee) That's what I thought he did. That's what I thought he did.¹

¹Kenneth Clark made a similar response to Judge Huxman's remark, saying, "He (Huxman) certainly succeeded."

"All Deliberate Speed"

In speaking of the word "equal" Mr. Marshall quoted Justice Frankfurter: "Once in a while, English words mean English." When arguing for the quick implementation of the Brown decision before the Supreme Court in 1955, Mr. Marshall used the word "forthwith." Justice Frankfurter interrupted with the statement: "I am sure you will agree in this kind of litigation it is of utmost importance to use language of fastidious accuracy." Mr. Marshall replied, "Absolutely."¹ As contrast, in Justice Frankfurter's vocabulary, Mr. Marshall referred to the "all deliberate speed" statement in the 1954 decision as "a Frankfurter phrase," explaining that Justice Frankfurter, "...read British law like mad and this wording was in two British cases. I called (one of his) former law clerks and asked where did the phrase 'all deliberate speed' come from. He said, 'Are you kidding? That's Felix's favorite phrase.'" When Mr. Marshall remarked, "I haven't seen him write it any place," the former law clerk replied, "Right in the back of his head."

During the interview, Mr. Marshall recalled that shortly after the opinion was read, he and several lawyer friends in his office were arguing about the meaning of "all deliberate speed." "My secretary...went over to Webster's dictionary and found that one of the early definitions of 'deliberate' is 'slow.' She said, 'Simple, it means with all slow speed!' How right that girl was! How right she was!" It can be anticipated that contrary to this, Mr. Justice Marshall's opinions will have few words and that they will have simple English meanings, understandable even to the layman.

Praise for the Baltimore Superintendent

"Baltimore beat everybody" in the integration process in the opinion of Mr. Marshall:

They had a good superintendent, a good superintendent... He was rough, really rough. When he came in there, my mother was teaching--boy, I know. He said he was going to do everything he could do without going to the Board or anybody else. First thing, he made the teachers meet together. Then all professional meetings were together. Every once in a while a Negro supervisor would show up at a white school and his answer was

¹Berman refers to some Frankfurter words as "sesquipedalian." (2.p.68) The Random House dictionary gives the number one definition as, "Given to using long words." A more literal meaning is, "a foot and a half."

always cute. He'd say, "Well it could be an accident." He desegregated the Polytechnic Institute. That was Board action. I argued before the Board and got it through, but he did the work on it...it was pride...at the end even of three years (a graduate) could enter M.I.T.

A Real Interest in Schools

We speculated some about possible litigation over segregating school children according to I.Q. or similar measures:

MR. MARSHALL: They (some educators) don't want the talented ten in with the other ones.

DR. SPEER: Which is still pretty common practice, to isolate out the low I.Q.

MR. MARSHALL: Well, we have it in the District of Columbia with what we call the "track system."

DR. SPEER: Yes, the same thing.

MR. MARSHALL: Oh, it's awful!----I like what we do in some private schools now like the Dalton School where my kids were in New York before we came to Washington. They had just gone back to the old progressive education...let the kid concentrate on math when he wants to, then concentrate on something else...and when they went back and checked the record it was unbelievable: 99.44% of them, when they finished the sixth grade, had a well-rounded education...it was the darndest thing, the darndest thing. Keep Ralph painting all day for two weeks, and another kid doing math for two weeks...but they do have to concentrate. That's why I said it is the opposite of this track thing.

Arguments are still going on about the effects of segregation. The Supreme Court declared segregation "inherently unequal." The superintendent of a large city system recently said, "The notion that only segregated education can make for quality education is a myth that needs to be exploded." Thurgood Marshall put it clearly and simply, "The only way I can be sure my child is getting an equal education is for him to be in the same room." He might have added that this is the only way for them to get into "the main stream of American life" as he did before the Supreme Court.

Majority or Dissent

Thurgood Marshall's interests, competencies and experience go far beyond segregation and civil rights. As Solicitor General, he has plead the usual range of government cases. His opinions, arguments, and public statements have not been biased for the Negro, right or wrong. As might be expected, he, "could do without Stokely Carmichael." He showed respect for opposing views in praising Judge Parker, who heard the Clarendon County, Virginia segregation case and ruled against the plaintiffs, but helped to make sure the appeal was in good order.

Thurgood Marshall naturally can endorse the great decisions of the "Warren Court" on desegregation, civil rights, the one-man-one-vote principle, limits on wire tapping, and required counsel for all accused as decided in the Gideon case. He speaks with deep affection for Justice Black. He saw Chief Justice Warren as a man who had brought a decisive new emphasis to the court.

Mr. Marshall reasons as a philosophical pragmatist, considering the social context, consequences, and relativity of rights. He is a humanist who believes that law was made for man and not man for law. He is a devotee of the "living constitution." On close issues of the type that have been frequently receiving a five to four vote, we may now expect six to three majorities. We may see a stronger tendency toward judicial pressure on states which, as he puts it, "fail to provide the necessary state machinery to assure equal protection of the laws" as well as on those who have set up obstacles to equal protection.

As one University of Chicago law professor said to me, "He will live up the Supreme Court." (The Warren Court has never been accused of being dead.) In general, he may become very influential. His winning record of 85 percent out of fifty-two Supreme Court cases probably means that he won as often as any single Justice on the Court voted with the majority. In other words, for this sampling at least, he has been very much "with" the Court before becoming a member. As junior member of the tribunal, tradition dictates that he will become doorkeeper in the conference room because all discussion is so secret that no clerk or secretary is allowed. Among the nine Justices he will be one man with one vote. But beyond that he may become as persuasive on the court as he was before the court.

At the end of the interview with the tape recorder still running, I again asked if there were any restrictions on using what he had said. "No. Just don't put my southern brogue in there."

I wish I could. The recording communicates a presence with much more charm and wit, humanism and wisdom than can be captured by the printed word.

Dr. Malcolm Sharp's Garden Parties

Among the University of Chicago law professors who frequently met with Thurgood Marshall and his colleagues to plan the segregation cases was Dr. Malcolm Sharp. On October 30, 1967, he granted me an interview at the University of New Mexico where he has been teaching law since he retired at Chicago.

Dr. Sharp recalled: "They were arguing the restricted covenant cases at the same time they were preparing these (segregation) cases and they used to bat problems back and forth. They had a hypothetical case which they called "Sharp's Garden Party." I invited everybody to my run-down back yard (in Chicago) where the kids played but we called it a garden."

Dr. Sharp had testified in the Oklahoma, Texas and North Carolina University cases. He found only South Carolina unpleasant. There the witnesses encountered an "old fashioned cross-examiner."

The Texas University faculty was a little offish ...I went to one of the most wonderful parties of my experience during the Texas case. Curiously enough I was the only white person there. I would have supposed that some of the people I knew at the University of Texas would have showed up but they did not. There were journalists from New York, all kinds of people, wonderful--like some of the parties in four scenes and three acts. Lawn party, pleasant amount of drinking, not too much, just convivial. It was a great occasion...

One of the things I remember vividly from the cases were the (University of Texas) students standing around the courtroom and moving in and out all through these days, a lot of them standing, very quietly, and listening.

I like the Oklahoma faculty who said what they thought. They didn't hedge. There were some on both sides. Dean Keeton, who was Dean of Oklahoma at that time was later made Dean of Texas much

to my amusement. He didn't do any pussy-footing at all. He was very sure that our position was right. One of the members of the faculty thought it was wrong and said so...

Commenting on the speed with which the segregation cases moved, Dr. Sharp said, "I sometimes find it hard to realize that nothing of this sort was going on in Roosevelt's time... There was a lot of dammed up influence accumulated. I think it went a lot faster than Thurgood expected."

"Argumentative Testimony"

When I asked Dr. Sharp if he had helped argue any of the cases, he said, "No. The line between giving testimony as an expert in these and arguing them is a thin one sometimes. It is argumentative testimony."

Modest about the credit given him by former colleagues at Chicago and by the Negro leaders, Dr. Sharp said:

There was a very able group of Negro lawyers in all the cases from different regions. It was a fluctuating group. I am sure that Thurgood is honest and warm-hearted in giving the professors the credit but I must say I think he and his group are the ones who are most entitled to it...There has never been a group of lawyers in the country, still less, underdog lawyers, who had such a steady string of victories to their credit. It is actually unprecedented. (37.)

Ming's Historical Approach

The lawyers for the two sides were operating under the principle of advocacy and naturally reporting only the evidence that would support their respective cases. As pointed out in Chapter Seven, the Eisenhower administration was concerned about the political repercussions of a conspicuous government stand which may also have prevented the Department of Justice research report on the five questions from being altogether objective. Therefore, although the "pile of reports was as high as a desk," some of the most relevant true history may have been omitted.

William R. Ming thinks so. In our interview and in several addresses he has said that the research on the five questions could have been quite important; but the historians had missed the boat by not having dug out more of the true story earlier.

Mr. Ming pointed out that much of the real argument about the Fourteenth Amendment had gone on in Republican caucus and therefore was not a matter of formal record. He noted that Chief Justice John Marshall had decided that the first nine Amendments did not apply to the states. This left a big loop-hole. Many Congressmen were afraid that the states would negate the principles won by the military in the Civil War. Therefore, there was a real need felt for the Fourteenth Amendment. The majority of the Congress wanted an amendment to abolish segregation and preferred to use the amending process rather than a legislative attempt so as to avoid facing their constituents on the issue.

Mr. Ming agreed with the statement made by Earl Warren, both in the decision and in the interview with David Atkinson: Had public education not been in its infancy in the North and practically non-existent in the South, it would have entered prominently in the discussions on the proposed amendment. He also referred to a Kentucky law against segregation in housing, during World War I days, forbidding selling a house to a Negro unless the block was already more than 50% black. The Supreme Court overruled the case. This could have been a significant precedent for the school segregation cases. (34.)

Fourteenth Amendment Misused

Mr. Ming also emphasized the now well-recognized historical point that the Fourteenth Amendment had been misused by the courts for years. The due process clause had been applied much more to property than civil liberty, often for the protection of the corporation rather than the common man.

Inter-Disciplinary Approach at Chicago

Both Kenneth Clark and William Ming have indicated there was a high level of communication between the leading minds from law and behavioral science. Naturally it was not immediate and complete. Dr. Clark often served as liason between the two groups. Ming pointed out that the social sciences permeated much of the legal thinking on the Chicago campus because students admitted to the law school usually had an undergraduate major in one of the social sciences and a real community of scholars developed with a large measure of inter-disciplinary thinking. Mr. Ming linked the process to one of the things "that make a law school great" as the Supreme Court said in decrying the required isolation of Sweatt in the Texas case. (34.)

The late Dr. Robert Redfield, then Chairman of the Anthropology Department, and Dr. Ralph Tyler, formerly Chairman of the Education Department and later Dean of the Social Science Division at Chicago, were both involved in the trial planning. It was from Dr. Tyler that I obtained some of my briefing for the Topeka case.

CHAPTER IX

QUESTIONNAIRE TO SOCIAL SCIENTISTS

Stable and Consistent

A number of legal scholars, politicians, journalists, academicians and other commentators have questioned the stability of the behavioral science theory in regard to segregation. Some of the criticism of the desegregation decision was based on the alleged overemphasis of expert testimony, the alleged disagreement among experts and the rapidity with which they change their views. Samples of such comment can be found covering the full range from emotional tirades against "pseudo-scientists" to more sober objections on the use of such a young science in such an important decision.

Some of the most volatile attacks upon the social scientists who took part in the public school cases were heard on the floor of the United States Senate. The day following the release of the decision, Senator Richard Russell of Georgia disparaged the basis of the decision:

The court substituted psychology for law and precedent in interpreting the Constitution of the United States. The rights of states and individuals should not be subjected to amateur psychologists whose chief experience has been in the field of practical politics. If the court is to rely on psychology we should add psychologists of recognized ability or provide the court with a psychologist to help get out the decision.

Senator Price Daniel of Texas also ridiculed the psychologists and declared that they were "the ones who are attributing inferiority to the Negro. We can have separate and equal schools which can be equal. The Negroes of my state prefer that their children have their own schools and their own teachers." (9. May 18, 1954, p.1-2)

On May 26, 1955, five days before Warren read the unanimous opinion of the Court on implementation of the desegregation decision, Senator James O. Eastland of Mississippi delivered a speech to the Senate in which he attempted to discredit the "so-called modern authorities cited by the Court" and maintained that "the Supreme Court had been indoctrinated and brainwashed by left-wing pressure groups." He declared that English jurisprudence had never been based on "such dubious authority":

...my information is that the one time when the high appellate court of any major Western nation has resorted to text books and the works of agitators to sustain its decision was when the high court of Germany sustained Hitler's racist laws.

What the Bar and the people of the United States are slow to realize is that the rendition of the opinion on the school segregation cases the entire basis of American jurisprudence was swept away. There is only one other comparable system of jurisprudence which is based upon the winds of vacillating, political, and pseudo scientific opinion--the Peoples Courts of Soviet Russia. In that vast vacuum of liberty the basis of their jurisprudence is the vacillating, everchanging winds of pseudo authority. And that today is the basis of American jurisprudence as announced by a unanimous opinion of our Supreme Court.

Such emotional diatribes were perhaps to be expected of the Southern members of the Congress during a period in American History when witch-hunting in the McCarthy manner was in its hey-day. However, there were more sober voices raised with concern over the use of social science by the courts. One of these was John W. Davis. As chief attorney for the appellees in the public school cases, he had attacked social scientists before the Supreme Court:

I am tempted to digress, because I am discussing the weight and pith of this testimony, which is the reliance of the plaintiffs here to turn back this enormous weight of legislative and judicial precedent on this subject. I may have been unfortunate, or I may have been careless, but it seems to me that much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.(44.)

Another voice of concern was that of the late Dr. Theodore Cahn, Professor of Law at New York University. Dr. Cahn was a legal scholar who saw a danger in the precedent because social science is "so very young." He questioned the wisdom of relying on the findings of a discipline he labeled "young, imprecise and changeful." (See Chapter Ten.)

The View Fifteen Years Later

In order to test the "young, imprecise and changeful" nature of behavioral science, we sent questionnaires to the expert witnesses who took part in the desegregation cases and to the thirty-two who signed the social science statement attached as an Appendix to the Appellants' Brief. (47.) The object was to find out how their views had changed in the past fifteen years. A control group was also selected, more or less at random, of people whose attitudes on school segregation were not so much a matter of record--at least, they had not been involved as signers of the statement or as witnesses in the trials. We asked a number of people to suggest names of sociologists, psychologists, educators and anthropologists roughly of comparable age and distinction. We added several who were obviously of this category. The Table on the following page shows the results of the questionnaire from all three groups.

Each witness was sent a copy of his testimony. A copy of the social science statement (Appendix A) was sent to the signers and the control group. The first six questions indicate the different roles of each group. But the questions are aimed at a similar objective, namely, an appraisal of the stability of professional judgments in the social sciences by comparison of views in the early 1950's with those in 1967.

Two conclusions stand out about the replies to the first six questions:

(1) There is a high degree of consistency among the three groups on all questions.

(2) The basic views of ⁴fifty-nine of the country's leading behavioral scientists regarding the social and psychological evils of segregation have been very stable for fifteen years.

The last six questions were asked of all three groups. They deal with justification for the basis of the decision and its implications for the future.

The Statement Group

Of the thirty-two who signed the social science Appendix¹ to the Appellants' Brief for the Supreme Court, twenty-nine are still living. We were able to contact twenty-five of these.

¹See Appendix A for complete text of the social science statement.

QUESTIONS	Statement Group		Witness Group		Control Group		Totals	
	YES	NO	YES	NO	YES	NO	YES	NO
1. Would you sign the social science statement today that you signed in 1952?	21	1					21	1
2. Would you have endorsed the statement drafted in 1952 if you had been asked?					18		18	
3. Would you endorse the same statement today?					17	1	17	1
4. In analyzing the evils of segregation, do you believe the social science statement								
Overemphasized					1		1	
Underemphasized	6				8		14	
Was about right	15				9		24	
5. Would you endorse the testimony today that you gave in the school segregation cases?			20				20	
6. In dealing with the effects of segregation, do you believe your testimony								
Overemphasized								
Underemphasized			2				2	
Was about right			15				15	
7. Do you believe a decision based on social science was justified?	21	1	18	2	15	1	54	3
8. Do you think the Brown decision points with new emphasis to the courts as avenues for social change and redress for minorities?	13	2	7	17	2	1	41	6
9. Do you believe court action on segregation by "tracking" or "ability grouping" is justified?	9	8	5	12	4	9	30	18
10. Do you anticipate a Supreme Court decision on state failure to provide necessary machinery to insure equal protection of the laws?	14	1	7	14	1	5	40	5
11. Would you favor such a decision?	18	1	3	16	2	14	58	5
12. Would you advocate an Act of Congress to this end?	15	1	6	14	2	4	40	6

?? Indicates no answer or qualified comment.

Kenneth Clark was interviewed rather than sent a questionnaire and two others; Mamie Clark (Mrs. Kenneth Clark) and David Krech returned questionnaires for witnesses since they also took part in the trials. The Table, therefore, shows a return of twenty-two for the social science statement group.

We discussed the social science Appendix with Dr. Kenneth Clark in his office in New York City on February 20, 1967. He explained how psychological knowledge had become the new factor in the decision and that the Appendix had been drafted to give emphasis to it. He said:

Surely, in the new element was the whole body of social science, social psychology, sociological research, which we brought together in the testimony which expert witnesses gave in the cases and the summary of that which we presented in the social science Appendix for the extension of the Brandeis brief formula.¹ Instead of including social science within the legal brief, we had the social science clearly in its own brief. (22.)

A lawyer who had participated in the university desegregation cases before the Supreme Court, William R. Ming, Jr., of Chicago, recalled in an interview in February, 1968, that there was some disagreement among lawyers who prepared the brief for the Supreme Court as to the best way of introducing the behavioral science evidence and the degree of emphasis which it deserved. Putting the statement in as an appendix was somewhat of a compromise, according to Mr. Ming. (34.)

It is not known how much attention the Supreme Court Justices gave to the statement but the "modern authorities" referred to in the famous footnote eleven include some of the experts who had drafted the statement.

Dr. Clark retraced some of the work involved in putting together the statement:

Professor Isidor Chein of New York University, Stuart Cook and I hammered out the social science briefs...We sent them (the thirty-two signers) a draft of the material and asked them to read it and make any suggestions

¹The famous Brandeis brief, authored in 1906 by Louis Brandeis, originated the technique of using non-legal as well as legal evidence as a means of persuading the court.

or changes and write back. If a person didn't write back within the time, we called...We made revisions as suggested if they were substantive. I think there were very few.

...I don't think that there was a single person ...whom we asked to sign that statement who refused to. I don't think there was any revision which required rewriting or anything of that sort. Now it is true that Dr. Chein, Stuart Cook and Gerhard Saenger and I worked on it very long and hard...I wrote the first draft and then we re-drafted and the final draft Stuart Cook was involved in. He was just wonderful because he brought the appearance of white, Anglo-Saxon dispassionateness to our task where I had a tendency sometimes to be a little strident. Stuart would say, "Well, now, we don't want to lose our point by overstatement"...We tried not to make any statement in that document which could not be documented... We chose these thirty-two on basis of their involvement in these problems, either theoretically or by research or as teachers, or, in a few cases, as practitioners.

To check the "uncertain life expectancy" of these behavioral science theories, the first question asked of the statement group on the questionnaire was about their current feelings on the fifteen-year-old document:

QUESTION: Those who signed the 1952 statement on the effects of school segregation indicated that they were in substantial agreement on the points covered. Would you still endorse the statement to this extent today?

Practically all the respondents seemed to indicate that they would still endorse the statement. Their comments on the question reflected a strengthening of the opinions held in the early 1950's in light of evidence that has accrued since then. Some of the replies were as follows:

Noel P. Gist, University of Missouri at Columbia:

I am not aware of any new scientific evidence that would in any way invalidate the statement.

S. Stansfield Sargent, Clinical Psychologist, VA Hos/pital,
Phoenix Arizona:

It seems on re-reading to be as generally accurate and incisive as when it was written.

Arnold M. Rose, University of Minnesota:

We disagreed over some minor aspects of wording and the degree of reliability of some of the studies reported. Since 1952, there have been many more pertinent studies, and the weight of evidence in support of our 1952 conclusions has become stronger.

Instead of endorsing the statement exactly as written, Gardner Murphy of the Menninger Foundation wrote: "As of 1967, I would think a very different document would be needed."

QUESTION: After further research and development of theory, what is your present attitude toward the content of the statement on the evils of segregation?

I now believe the evils were underemphasized.

I now believe the evils were over emphasized.

I still believe the emphasis in the original statement was about right.

A majority of the responses on this question indicated that after fifteen years the social scientists still believe the emphasis in the statement was about right. A total of six, however, felt the evils were underemphasized in the statement. No one felt that the evils had been overemphasized. Again, some of the replies point out that if the statement were drafted today, stronger evidence could be presented:

Gordon W. Allport of Harvard:

The evidence was less strong than the signers might wish; but more recent evidence (Coleman report, etc.) make the position taken in 1952 more secure now than then.

M. Brewster Smith of University of California, Berkeley:

While the forefront of legal concern has shifted from legally enforced segregation to de facto segregation, neither problem is yet solved, and considerably more weighty evidence concerning the deleterious effects of segregation is available today than was available to the drafters of the "Appendix to Appellants' Brief."

Noel P. Gist of University of Missouri at Columbia:

As everyone should realize, the statement did not and could not spell out precisely, or in quantitative terms, the effects of school segregation on all individuals. It, that is, the statement was largely a matter of evaluation of available evidence. I believe the emphasis in the original statement was about right. The effects were certainly not overemphasized.

Isidor Chein of New York University:

I think that the weight of the evidence is stronger today or, to put it differently, there is a great deal more evidence that can be cited. I do not think, however, that any significant substantive revisions are called for.

Arnold W. Rose of the University of Minnesota felt a shift in kind of emphasis might have been preferred rather than a shift in degree: "I would have given a little less weight to the psycho-analytic generalizations and somewhat more weight to the feelings of rejection and the damages to the self-concept."

Ira DeA. Reid of Haverford College felt the evidence at the time would have supported an even stronger document: "We knew more than we wrote but time was brief, the correspondents were few. (I was surprised that only four of the number--the Clarks, Allison Davis and I--were Negroes.) What we knew, many of the others would not buy--supporting evidence to the contrary notwithstanding."

The Witness Group

Thirty-one social scientists testified in the desegregation trials in the early 1950's. Of those still living, we were able to contact twenty¹, including Kenneth Clark who spoke of his participation in the trials during our interview. He described his role as the bridge between the fields of social science and law:

I worked day and night with the lawyers trying to understand their problems, as they defined them,

¹The response to our questionnaire was extremely gratifying. Especially appreciated were those letters and comments from colleagues and relatives of those witnesses now deceased. One of these letters was from Ava English, wife of the late Horace B. English who had testified in several of the trials. She wrote in part: "The chance to testify in these cases was one of the greatest satisfactions in my husband's life. Of that I am sure. He was always ready to recount with relish various incidents connected with them. I am also sure, had he lived to witness the present scene and all that has intervened, he would retract not one word of what he said at that time, nor modify except in the direction of strengthening his testimony if possible."

and trying to see the extent to which social science could be relevant and what social scientists would be appropriate as expert witnesses in terms of their research interest, personality, and willingness to be involved. I assumed they were all talking with prospective witnesses, trying to explain to them my understanding of what the legal problem was. I tried also to help the lawyers understand the difference between social science and law. (22.)

The first point on the questionnaire to the witnesses was similar to that for the statement group and dealt with the long-term validity of their views.

QUESTION: Would you still essentially endorse the testimony that you gave at that time?

The replies to this question were unanimously in the affirmative. Comments on the question reveal the belief that more extensive scientific evidence now available would justify an even stronger stand today. Typical of the replies to this question was that of Harold J. McNally of Teachers' College, Columbia University, who wrote, "If anything, I am more convinced now of what I said than I was then." Other responses were similar.

Wilbur Brookover of Michigan State University:

I would no doubt go much further now.

Isidor Chein of New York University:

...in its basic substance, I see no reason for revising any major aspect of my testimony.

H. Brewster Smith of University of California, Berkeley:

The question is whether legally imposed segregation can ever result in facilities that are equal. The assessment of equality is an empirical matter to which "modern authority" in behavioral sciences is manifestly cogent. The 1952 testimony can be criticized in terms of the less than wholly adequate state of the evidence on which expert opinion was based. The cogency of that opinion, however, seems to me beyond question, and the evidence to back it up is firmer today than it was then."

Expert behavioral science witnesses were called by the defense only in Virginia. Two of the four returned questionnaires: Dr. Lindley Stiles and Dr. Henry E. Garrett.¹

¹The defense also called several school officials who did not qualify themselves as behavioral scientists.

Dr. Stiles was Dean of Education at the University of Virginia at the time of the Davis case in which he testified. He has been criticized for presenting segregation as a social disease, and yet, defending it as the best hope of educating all people to the idea of peaceful integration. (13.) His comments on the questionnaire indicate that Dr. Stiles still feels justified in his position in the Davis case on the evils of segregation. But the perspective of fifteen years has tempered his judgment about the ability of law to bring about social change. His comment on the first question was:

I thought segregation was wrong then and said so; I still think so. My testimony compared treatment of Negroes in non-segregated states with patterns in the South. History has supported and given visibility to the plight of the Negro as a minority all over the nation. My view that education is essential to the elimination of racial prejudice still stands. Perhaps now I would place some additional confidence in the force of law--over the long pull.

The second witness called by the defense who returned a questionnaire was Dr. Henry E. Garrett, an outspoken opponent of integration and of the Supreme Court's role in trying to bring it about. Dr. Garrett was Chairman of the Psychology Department at Columbia University when he testified in the Davis case. His position as a past president of the American Psychological Association and as a long-time, eminent professor at Columbia have added weight to his pro-segregation statements. His professional status coupled with his pro-segregation views have contributed to the idea that there are wide disagreements among social scientists about the deleterious effects of segregation. Dr. Garrett's answer to the first question regarding his testimony in the trial was as follows:

I would have favored segregated schools more strongly if I had foreseen the present chaos brought about by OEO and HEW. Desegregation hasn't worked and will only be accepted in the South as a necessary evil--which one must live with; at least for a time.

In his recent book, Challenge to the Court, I.A. Newby describes the use of science by segregationists since 1954 and analyzes the ideas and the literature of scientific racists. Newby writes as follows about Dr. Garrett:

Inasmuch as he accepted in its entirety the segregationist position in civil rights controversies, he was a god-send for segregationists in the Davis case; he was especially useful to the Virginia attorneys, a man whose credentials matched those of any witness for the NAACP. Garrett's attitude toward segregation bore little resemblance to that of Dean Stiles. He showed none of Stiles' ambivalence, repeated none of Stiles' homilies about the future of interracial progress in the South. He endorsed segregation openly and directly, and his testimony in the Davis case was only the first of a long list of services he has performed for the segregationists and scientific racists. Since 1954, he has played a leading role in the history of scientific racism... ¹ (13.)

The testimony Dr. Garrett gave, however, is viewed by others as backfiring on the Virginia attorneys and in the long run helping the Negro cause. As reported in Chapter Ten, Dr. Clark felt this very decidedly at the time of the trial.

A second question^t asked of the witnesses dealt with their present perspective on their testimony of fifteen years ago. The question was:

QUESTION: After further research and development of theory, what is your present attitude toward the main points covered in your testimony?

I now believe my testimony overemphasized the effects of segregation.
I now believe my testimony underemphasized the effects of segregation.
I still believe the emphasis in my testimony regarding the effects of segregation was about right.

The response of the witnesses to this question was consistent with that of the statement group. Most of them felt that their earlier emphasis on the evils of segregation was about right. Several thought they had underemphasized the effects. None felt they had overstated their arguments.

M. Brewster Smith voiced the idea that although the situation has changed today, the essential points made in the early 1950's were still relevant:

¹Reprinted from Challenge to the Courts by I.A. Newby by permission of Louisiana State University Press. Copyright 1967.

Today, effects of educational segregation as such would have to be seen in the context of other intellectual and personal handicaps resulting from ghettoization. The need for special compensatory education is now more salient. But to recognize this does not seem to me to change the essential points made in the testimony.

Dr. Isidor Chein of New York University explained the emphasis of his testimony and his present feeling about the effects of segregation as they exist today:

The burden of my testimony had two foci, one the Survey of Social Science Opinion, and the other on the effects of governmentally enforced segregation on personality development. I did not testify on detrimental effects of segregation independently of the sources of the segregation. I believed then, and believe now, that there are such detrimental effects--but, both then and now, I felt (and feel) that the most serious effects are related to the segregation effected under the aegis of the law or public agencies. Since then a major change that has occurred, particularly in the large urban centers of the North, is that unofficial segregation is perceived by many more Negroes as an expression of public policy. The difference between official and unofficial segregation has, I believe, correspondingly diminished...The realization that the possibility exists of doing something about being rejected rests in one's own hands has had some good effects on the self-esteem of Negroes, particularly Negro youth, if not such good effects on peaceful relations with whites. They may sneer today at the relative ineffectiveness of the 1954 Supreme Court decisions, but its immediate effect was to galvanize the Negroes of the United States into a realization that their fate and status was in large measure in their own hands. This effect is still with us.

David Krech, of the University of California at Berkeley, commented in a similar vein:

I am almost tempted to say that the "behavioral supports" (to which I referred in my testimony) of discrimination provided for by legal segregation have turned out to be so effective that the Negro has fallen complete prey to all of this. Some Negroes now see themselves as culturally, psychologically, and

physically different from the whites. Or put in another way; it is the behavioral supports of the South which have finally convinced the Negro that he must seek black power, and not people power.

Dean Lindley Stiles, who had been called by the defense, recognized the evils of segregation in his testimony and now feels that he did underemphasize the effects of segregation. We quote him again:

No doubt I did (underemphasize), but not intentionally, since I responded to questions posed. I perhaps underestimated the willingness of people to move voluntarily to abolish segregation--in the non-South as well as the South...I thought, then, that better education for Negroes for a period of time would make integration easier, in southern states, particularly. The conflicts of the past decade support my concern that compulsory integration without educational preparation might lead to conflict. In retrospect, it seems that there is no easy way to integrate the races; hence, the decision by the court to move with "all deliberate speed" was the only course.

Dr. Henry Garrett, who testified for segregation, as reported above, stands by his original position. And he concluded with this comment:

Desegregation has failed (vide: Washington and New York City) and will never work unless local school officials are permitted to shift pupils--not Federal judges.

The Control Group

Eighteen of thirty-one questionnaires were returned from the control group. Although 58% return is below that generally desired for reliability, the fact that the respondents are predominately consistent with each other gives the results a good degree of significance.

QUESTION: Would you have endorsed the social science statement at the time it was drafted had you been asked? Would you endorse the statement today?

All eighteen of those responding answered that they would have signed the statement and all but one would endorse the statement today. Several commented that they could endorse the statement with more confidence today.

Thomas F. Pettigrew of Harvard:

I would endorse a stronger more detailed statement, too, since we now have far better data upon which to base it...

A. Harry Passow of Teachers' College, Columbia University:

This "yes" must be qualified by a belief that better research is now available and a better-balanced statement is possible. A different emphasis might now be appropriate.

Only one member of the control group preferred to remain anonymous. His reason was that his "present position is not central to this field." While respecting his wishes, we include his comments since they are the only ones from the control group which differ markedly from the concensus. His answer to the first question was:

On the basis of both sentiment and belief and based on evidence available at that time I would have agreed. Having studied the evidence more carefully since then, I would not endorse the statement.

Members of the control group were then asked to express themselves on the emphasis in the social science statement.

QUESTION: After further research and development of theory, what is your attitude toward the content of the statement on the evils of segregation?

I believe the evils were underemphasized.

I believe the evils were over emphasized.

I believe the emphasis in the statement was about right.

From the eighteen replies, again, only the one, who preferred to remain anonymous, felt that the evils had been overemphasized in the statement. He wrote:

While logically, segregation can lead to deleterious consequences for Negro children, little hard evidence was adduced to demonstrate the effects of legal school segregation, independent of other forms of segregation and discrimination in the early 1950's or prior to that time. This was the actual question posed by the Court.

The opposite point of view was expressed by Dr. Doxey A. Wilkerson of Yeshiva University, who indicated belief that the evils had been underemphasized in the statement. He commented as follows:

Recent studies on Negro self-concept and scholastic achievement in relation to segregation emphasize and further expand the findings reported in the 1952 statement.

On The Nature of the Decision

The wording of the remaining six questions sent to the three groups--statement, witness and control--were identical and concern professional reactions to the decision and its implications for the future. Since these questions had no bearing on the role the social scientists may have played during the trials, we have not broken down the responses by groups. The first of this series of questions was:

QUESTION: In his decision, Chief Justice Warren, referring to the circumstances surrounding the adoption of the Fourteenth Amendment in Congress and the ratification by the states (1868) said: "This discussion and our own investigation convinces us that although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive.

Later the Chief Justice quotes the Kansas Court: "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

Then he adds: "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson (1896), this finding (evil effects of segregation) is amply supported by modern authority."

In other words, the Chief Justice, in rejecting the "separate but equal" doctrine of 1896, seems to be stressing "modern authority" in behavioral science rather than legal precedents and legislative intent.

Do you generally agree that a decision on this basis was justified?

Fifty-four of the sixty replies agreed that the decision was well-justified on a behavioral science basis. Several pointed out that such a basis for a court decision was really not so "new":

W. W. Charters of the University of Oregon:

Why should not contemporary knowledge have as much authority as knowledge invoked in the past?

Gordon W. Allport of Harvard:

There is a difference. The 1896 decision (Plessy v. Ferguson) was equally influenced by "social science" but it was not much more than William Graham Sumner's opinion that was influential.¹ In 1952, there was at least some empirical evidence.

Isidor Chein of New York University:

I can see no rational alternative. It is an illusion that law merely rests on legal precedents and legislative intent. It is full of assumptions (both in the precedents and intents) concerning the determinants of human behavior and a good deal else. "Modern authority" may be full of flaws in these matters, but it is still more soundly based than older, not explicitly acknowledged, tacit authority."

Doxey A. Wilkerson of Yeshiva University:

Such basis for court decisions have always been used; the essential difference here is that the social-science premises were made explicit.

Others wrote more generally and saw the decision as a necessary recognition of the behavioral sciences by the courts:

Noel P. Gist of the University of Missouri, Columbia:

I strongly agree that a decision on this basis was justified. Unless such decisions can take into full account and with approximate emphasis, social, cultural, and psychological aspects, based on ^{some} scientific evidence, then decisions based on legal precedence ^{lose} touch with realities.

M. Brewster Smith of University of California, Berkeley:

Decisions based on precedent alone cannot stand up indefinitely unless they are in reasonable harmony with scientific findings. We accept this for the physical sciences, and are on the way to accepting the idea also for behavioral sciences.

¹ See Chapter X.

Wellman J. Warner of New York University:

I have checked "Yes" but I have some uneasiness about the apparent sharp division you make between "legal precedence and legislative intent" and "Modern authority" in behavioral science. If the formulation intends to ask whether there is emerging a recognized authority of opinion in the findings of a new segment of specialists in the behavioral fields of scholarship, then the answer is clearly in the affirmative.

Harold J. McNally of Teachers' College, Columbia University:

There is no doubt that research findings and implications from behavioral science research of the past fifty years or more have necessitated a broadening of our conception of the meaning of "equal protection of the law." Any decision which ignores these findings rests on less than all the available evidence.

Three respondents from the total of fifty-nine included in the survey indicated that they believed the behavioral science basis of the decision was not justified. Their disagreement, however, did not seem aimed at the use of the behavioral sciences as such, but rather at the evidence which the court chose to recognize from the behavioral sciences. Two of these three asked to remain anonymous. The other one, as might be expected, was Dr. Henry E. Garrett, who wrote:

There was no real evidence of the "evils" of separate schools. Warren in the 1954 decision said that when children of the same age and same "educational qualifications" were separated, it causes all sorts of difficulties. He was wrong then and is wrong now. Federal judges have forced Negro children into white schools without regard to qualifications--a cruel farce for the Negroes. K. B. Clark's "doll testimony"--the only experimental evidence offered has been shown to be "phony" (see van den Haag). Desegregation will work only when a very few almost white Negroes are desegregated. These few will not be happy.

One of the anonymous answers was from a witness who had testified during the trials but felt the evidence presented was largely unsubstantiated. He commented as follows:

¹ See Chapter X regarding other evidence, direct and indirect.

At the time of the 1954 decision, scientific research on the psychological effects of segregation was fragmentary. Counsel for the plaintiffs and the "expert" witnesses brought to testify in their behalf overstated what was then known about the impact of segregation on the child. We were "reaching" and we knew it.

The other anonymous reply seems to echo Dr. Garrett:

The evidence offered in support of the allegation in the Brown v. Board of Education case was insubstantial, hearsay to some extent, and over-reached the reasonable implications of any known psychological research up to that time. As stated by one of the protagonists in an article quoted by the Court, "Agreement by scientists does not constitute scientific evidence..." A board of independent investigators evaluating the evidence would not, I am convinced, have agreed with the Court.

Thomas F. Pettigrew of Harvard commented that the question we posed was itself slanted, "since Warren's decision was by no means based solely or even largely upon footnote eleven." A colleague of Dr. Pettigrew at Harvard, Robert J. McCloskey, distinguished professor of American History and Government, wrote in his book, The American Supreme Court, that the decision did in fact lean too heavily on modern sociological and psychological literature and, because of the lack of legal case work in it, was not the persuasive document it could have been. The question it seems remains very much alive--for legal scholars, behavioral scientists and the public at large.

The next question focuses on the idea that the decision on Brown v. Topeka opened a new chapter in American social justice:

QUESTION: The Brown v. Topeka decision is not the first to rely heavily on social, economic, psychological or cultural considerations in addition to (or even in lieu of) the traditional basis of legislative intent and judicial precedent. Yet, this case may be the greatest example with the most significance.

Do you think the Brown v. Topeka decision has important implications for social change in the future? That is, does the Warren decision point to an increasingly easier avenue of redress even for small groups of citizens. Since legislation requires majority support for passage and enforcement, is an

additional or alternate channel now more definitely indicated through the judicial process utilizing the "new knowledge" in behavioral science for establishing and carrying out human rights?

Out of the sixty replies, forty-one responded affirmatively, six negatively and thirteen answered with caution and reservation or left the question blank. Several of the comments expressed hope for individual rights before Courts which would increasingly recognize scientific evidence.

Noel P. Gist of University of Missouri at Columbia:

As a behavioral scientist, I believe that the judicial process may be implemented effectively by greater reliance on proper evidence from scientific investigation which can be evaluated by judges not necessarily under political pressures or subject to popular prejudices. It is quite apparent that the efforts to achieve educational equality would have been quite different if the decisions had been made by legislative bodies.

Lindley Stiles of Northwestern:

Certainly, minorities need avenues to justice that do not depend on majority decisions; otherwise, their rights may be sacrificed to the selfish interests of the many.

Kenneth Clark remarked about the significance of the decision in our interview:

I couldn't agree more with you than that the Brown decision clearly supports the contention that the judicial route was the most effective way in attempting to bring about changes in the racial pattern in America and tended to justify the approach of the NAACP. I think also that the decision precipitated the whole civil rights crisis..I'm sorry to see that we had to deal with the problems which led to the Brown decision through the courts. Because I think it means the issue here is basically an educational issue, and the courts here had to enter only because the educators had defaulted. I, as an educator, am not particularly happy when fundamental educational and human issues have to be decided by litigation. In a very real world, I suppose, this has to happen. (22.)

Some of the replies cautioned against belief that judicial action alone would be able to bring about social change:

Louisa Howe of Harvard Medical School:

The NAACP was, I believe, responsible for convincing the courts that social scientists could properly serve as "expert witnesses" (like physicians, and scientists in other fields). The May, 1954 decision by itself accomplished almost nothing; legislative and executive leadership and action have also been necessary--and still precious little desegregation has occurred. The decision has great symbolic importance, however, and is something of a milestone and turning point--but only one of many, occurring both before and after May, 1954.

Floyd H. Allport of Syracuse University:

Perhaps sometime in the future, yes--but at present our knowledge in behavioral science is not sufficiently extensive or secure to warrant building this judicial action and control process into the constitutional framework of government. That is, I would agree if you would qualify this--make it apply now only to very clear and significant cases, as this was.

Viola W. Bernard, Psychologist and Psychiatrist, New York City:

The aftermath of the decision also seems to indicate the difficulties of effecting social change through the judicial process without concurrent and congruent changes in legislation, so that every effort should be made for the application of behavioral science to the legislative process as well as to the judicial process by a variety of attempted means, i.e., testimony at hearings, etc.

Six negative replies were received on the question of minority groups gaining easier avenues of redress through the courts as a result of the Brown decision. The most categorical "no" was from Dr. Henry E. Garrett, whose comment, however, implies that he does feel the Brown decision opens the door to changes, but, to his way of thinking, the wrong kind of changes. He wrote: "The 1954 decision set an evil precedent: the control of human behavior by law."

The next question we asked suggested court action on other forms of segregation. The Table indicates that there was greater variation in response to this question than to any other that we posed:

QUESTION: Do you think that a parallel case might be justifiably carried through the courts testing

school segregation on non-color grounds such as "ability grouping" or "tracking" based on such blanket criteria as I.Q. and/or general achievement tests?

The questionnaires were being sent out during the late spring and summer of 1967. It was during this period that Judge J. Skelley Wright of the U.S. Circuit Court of Appeals handed down his decision ordering "massive changes" in the schools of the District of Columbia. Therefore, we asked for response on the questionnaire in light of that decision, which called for abolishing the "track" system, integrating faculties and providing some bussing.

Response varied considerably on these questions. Some saw "tracking" as a rigid system of containment that allowed for no flexibility and was therefore stultifying. One of these was Thomas F. Pettigrew who noted, "the data revealing the harm of tracking is piling up rapidly--and 'bottom tracks' are apparently as unproductive for white as well as Negro children."

Some comments drew attention to the differences between segregation according to ability and segregation according to race:

M. Brewster Smith of University of California at Berkeley:

I believe the facts and competing values involved in this issue are more complex than those involved in the desegregation cases. I believe the behavioral science evidence is similarly cogent, but I myself am not ready to add it up as a basis for court-enforced policy. The "Coleman Report" presents relevant evidence, but is far from conclusive in interpretation. One must balance, it seems to me, an enormous number of complex considerations, including how "tracking" is based..and how "tracking" is linked with investment in programs of compensatory education for the educationally disadvantaged.

Noel P. Gist of University of Missouri at Columbia:

I am not prepared to make a categorical answer in respect to this question. It seems to me that the problem here posed (school segregation on the basis of ability) is of an entirely different order from the Brown v. Topeka case. But here, again, if there is solid scientific evidence of the effects of such segregation, that evidence should be taken into account by the courts and a decision based on it.

Julius Seeman of George Peabody College:

I would not expect the suit to be upheld. The issues appear to me to be quite different. A flexible track system is not discriminatory, but simply a way of acknowledging human variability.

Others also viewed ability grouping as a useful educational tool when used in the proper way:

Louisa Howe of Harvard Medical School:

A reasonable case can be made for "ability grouping" from an educational standpoint. Both slow learners and rapid learners can be gypped when a teacher has to deal with all levels of learning ability simultaneously, in one classroom...The problem in the D.C. schools that has led to the ordering of "massive" changes would appear to me to result from the abuse, rather than strictly from the use, of the "track" system. I doubt that the Supreme Court will rule on this principle.

Floyd H. Allport of Syracuse University:

There are things to be said in favor of segregation on basis of I.Q. and achievement as well as against it. The question seems far too complex to be resolved by a court decision and might lead to a dangerous precedent.

Lindley Stiles of Northwestern:

Such actions may, however, nullify the schools' capacity to serve individual differences. For example, if grouping by any criteria other than strict heterogeneity is forbidden, how could children be provided any kind of specialized instructional help? The results might make the school a "socializing" institution but not a good educational agency.

John J. Brooks of New York University:

A major issue of our times is the confusion between "equality" and "identity". Our democracy has decided that all citizens are equal before the law and in the various opportunities provided by our system. This does not make two white people or a white and a Negro equal in ability, tastes, or temperament. A sensitive curriculum sets up multiple programs for its multiple enrollment. It is "undemocratic" to force students to follow identical patterns in school, whose lives and backgrounds are otherwise so different.

Some of the replies registered concern that decisions such as Judge Wright's might trigger the wrong response. Harold J. McNally of Teachers' College, Columbia University wrote: "I certainly hope that doctrinaire applications of this principle will be avoided. For example, I believe that Judge Wright's wording in some portions of his decision may achieve the opposite of his intent. That is, forced integration of the remaining white school population in the District of Columbia may move the District's ninety-three percent Negro school population closer to one hundred percent. In other words, more than court decision is needed to solve the problem, necessary as court decisions are."

The one person from the control group who preferred to remain anonymous cautioned against the possible use of bias rather than strict scientific, objective judgment on the part of those who testified in segregation cases of any kind. He wrote:

The expert witnesses drawn from psychology can and should offer their best knowledge for the courts to apply in such cases. It is not proper for social scientists to stretch the credibility of research to "push" a particular point of view. They owe an allegiance to present what they know from available evidence but must not distort research evidence or they lose their objectivity. One may testify as a citizen but not as a scientist, if personal views are presented.

The single unqualified supporter of the track system was Dr. Henry E. Garrett, who commented: "I.Q. and achievement tests are far better criteria than judges' decisions. I like tracks; far easier for teachers to get their material across. God knows what the present Supreme Court would do."

The questionnaire then moved into the area of de facto segregation and the possibility of court action on failure to deal with it:

QUESTIONS: Thus far, interpretations of the Fourteenth Amendment generally have only forbidden segregation. They have not compelled integration. Therefore, de facto segregation has not been directly affected until some recent District Court decisions upholding U.S. Office of Education requirements.

Do you expect that within a few years the Supreme Court will likely render a decision to the effect that failure to provide necessary state machinery to insure equal protection of the laws is in and of itself a denial of equal protection of the laws?

Would you favor such a decision?

Would you favor an act of Congress to this end?

Forty-eight of the sixty respondents indicated that a court decision on this issue would be favored by them.

Two-thirds of the whole group indicated that they would like to see an Act of Congress dealing with the issue of de facto segregation. One of the answers on this point seemed to state the majority feeling:

M. Brewster Smith of University of California at Berkeley:

I would strongly favor such an act, and would prefer it to judicial decision on the ground that the Court has in recent years been bearing too heavy a burden in the support of civil rights and civil liberties. The nation would be in healthier shape if the Congress could take the initiative.

Summary

The Table on page 220 summarizes the responses to the twelve questions submitted to the three groups of social scientists--statement group, witness group and control group.

The first six questions all deal with the stability of social science theory applied to segregation for the past fifteen years. Almost without exception, the group that signed the social science statement appended to the appellants' brief in 1952 re-endorsed it in 1967. Likewise, the expert witnesses stood by their testimony. With the same high consistency, a limited control group supported the trial participants of 1951-53.

According to the combined professional judgments of fifty-nine well-recognized authorities who have been prominent in academic circles for the past two decades, social science theory regarding the effects of segregation has remained highly stable. In other words, time has shown the label of "young, imprecise and changeful" to be unwarranted. One significant development is that the conclusions voiced in 1952 are now better supported by experimental evidence and more systematic theory.

The social science views condemning segregation have not only been stable for two decades and probably longer, but also highly consistent from expert to expert and discipline to discipline.

The last six questions deal with a continuum of points on the significance of the decision and future projections of the role of the behavioral sciences in the judicial process. Although not as nearly unanimous as on the above questions, a large majority of the respondents endorsed the decision and with reasonable cautions agreed that the judicial process with the aid of behavioral science can be an increasingly effective tool for positive social change.

CHAPTER X

CONCLUSION

New Implications in the Equal Protection Clause

The social science evidence was given more time in testimony and argument in the several courts than all other points combined. The record includes the appendix statement signed by thirty-two of the country's best recognized authorities and the testimony of over thirty witnesses. As noted elsewhere, the wording of Chief Justice Warren's decision seems to give considerable emphasis to the social science viewpoint but only on reference, the famous Footnote 11, acknowledges it. However, the number of footnotes are not necessarily a measure of emphasis and it should be borne in mind that the cases summarized and referred to in the other footnotes had included a great deal of social science testimony and argument. Social science was before the Court, both directly and indirectly. Dr. Kenneth Clark points out, the references in Footnote 11 had over one hundred experiments back of them. (22.)

Robert Carter, representing the NAACP, told the Court that the Kansas judges had seemed to be in "confusion" and even "torture" because of the conflict between the "separate but equal" principle and their heavily weighted social science opinion. Justice Frankfurter, the most verbal member on the Supreme Bench, was one of the most committed to judicial restraint and the reluctance to overthrow past decisions. He, too, seemed to be in "torture" about the nature of the social science testimony and the consideration it deserved.

During the Delaware case he said:

...the testimony of a witness is subject to intrinsic limitations and qualifications and illuminations. The mere fact that a man is not contradicted does not mean that what he says is so...If a man says three yards, and I have measured it, and it is three yards, there it is. But if a man tells you the inside of your brain and mine, and how we function, that is not a measurement, and there you are...We are here in a domain which I do not yet regard as science in the sense of mathematical certainty. This is all opinion evidence...I do not mean that I disrespect it. I simply know its character. It can be a very different thing from, as I say, things that are weighed and measured and are tangible. We are dealing here with very subtle things, very subtle testimony. (55., pp. 68-69)

"Subtle testimony" it might have seemed. Yet the Court had agreed to hear the five cases that were so loaded with it and had listened to them for three days. At this stage even Frankfurter "did not disrespect it" but he felt frustrated in his quest for a certainty comparable to that too freely attributed to natural science and mathematics.

The use of social science evidence in courts of law was not new. The "Brandeis Brief" is often referred to as a prominent earlier example. Mr. Marshall spoke of the common practice:

MR. MARSHALL: Of course, we do it all the time. Well, in the securities field, federal trade field, labor board field, you'll find it all mixed up in there.

DR. SPEER: Increasingly?

MR. MARSHALL: Well, I've got a case right now that I am arguing on Monday involving the Securities Exchange Commission over against an insurance company. Two-thirds of the footnotes in both briefs cite books on insurance, philosophy and all that stuff.

DR. SPEER: Instead of law cases?

MR. MARSHALL: Sure, there's only one law case in there. We put (similar evidence) in the restricted covenant cases, but we relied on books then. We did not have any live testimony. I believe we put an appendix on it, because I know that Justice Frankfurter asked...and I explained that I thought it might be of interest. (32.)

Room for an Eight-Way Argument

The constitutional and human "rightness" of the segregation decision was almost sure to become more and more acceptable with the years. However, the Brown v. Topeka case continues to be highly controversial especially in regard to the extent of the role of the social sciences and the justification of that role. There are two general positions possible on each of three issues:

- A. It was a good decision.
- B. It was a bad decision.
- C. Social science was a major consideration.
- D. Social science was not a major consideration.
- E. Social Science is a justifiable factor.
- F. Social science is not a justifiable factor.

Within the framework of this outline there are eight possible mathematical combinations that make logical positions:

A C E, A C F, A D E, A D F, B C E, B C F, B D E, B D F.

Obviously, the above outline is an over simplification. With different definition of terms and degrees of feeling an infinite number of opinions are possible if spelled out in detail. However, a focus on these combinations helps to clarify the main positions that have been taken.

For example, formula A C E designates the view that it was a good decision in which social sciences were a major consideration and this was justifiable. Thurgood Marshall takes this position and there is much in the wording of the decision to support him.

Formula A D F represents the opinion that it was a good decision but social sciences did not really play a major role and should not be the basis for such a decision. Many lawyers take this position.

Formula B C F represents those who believed it was a bad decision, social science was used as the basis but this was not justifiable. Such was the position of Senator Eastland and the Southern Manifesto.

All of the other formulas have supporters but not as many as the three examples given.

Professor Cahn Criticized Reliance On Behavioral Science

The late Professor Edmond Cahn of the New York University Law School is often cited as one of the most able and sober critics of the way the Court handled the segregation cases.

Dangerous and Flimsy

Professor Cahn found the social science emphasis a dangerous precedent because social science is "so very young." (Others have gone so far as to brand it as "pseudo science." He did not.) He raises the question:

Does it really matter whether the Supreme Court relies or does not rely on the psychologist's findings?"

He then answers his own query:

I submit that it does. In the first place, since the behavioral sciences are so very young, imprecise and changeful, their findings have an uncertain expectancy of life. Today's sanguine asse~~x~~veration may be cancelled by tomorrow's new revelation--or a new technical fad... Suppose a generation hence, some ~~of~~ their successors were to revert to the ethnic mysticism of the recent past; suppose they were to present us with a collection of racist notions and label them "science"? What then would be the state of our constitutional rights? Recognizing as we do how sagacious Mr. Justice Holmes was to insist that *the Constitution be not tied to the wheels of any economic system what-*soever, we ought to keep it similarly uncommitted in relation to the other social sciences.¹ (3.)

Professor Cahn also saw social science as a flimsy basis for Negro rights. He used six pages to review and refute the "bad doll" test and testimony of Kenneth Clark and pointed out that:

Fortunately (for the Negroes) the outcome of the cases did not depend on the psychological experts' facing and answering the objections, queries and doubts I have presented.

In the Virginia trial, the defense appeared particularly inept. Far from caring to concentrate on the doll test and its scientific validity, the lawyer for the defendants was preoccupied with other lines of cross-examination. He had a different set of values to display. Why concern himself with dissecting the experts' logic and the correctness of their inferences? Instead, questions were asked which would convey disparaging insinuations about a professor's parents, his ancestral religion, the source of his surname, the pigmentation of his skin, or the place of his birth. If these items did not discredit him satisfactorily, then one went on to inquire how many years he had spent in the South; if he had lived in the South, how long in Virginia; and so on--implying all the while that science, common sense, and human nature would not dare to cross Virginia county lines. And, of course, there would be continual hints that what the plaintiffs' witnesses really desired to achieve was miscegenation and a mixed race. (3.)

¹ Reprints from "Science or Common Sense?" by Edmond Cahn in 1954 Annual Survey of American Law by permission of New York University School of Law. Copyright 1955.

Young but Stable

Compared to other academic disciplines which may have had their beginnings with the seven liberal arts of the Middle Ages, the social sciences are very young. But it does not necessarily follow that the social sciences are unstable and "changeable with the wind" in their application to segregation. As shown in Chapter Nine, sixty leading behavioral scientists, recanvassed in 1967, generally stood firmly by their conclusions of 1953. Their basic theories had not changed. Instead, they had been reinforced by more evidence.

Furthermore, social scientists were nearly all aligned on the Negro side. Justice Frankfurter made it easy for Thurgood Marshall to bring this out before the Supreme Court during the South Carolina hearing:

JUSTICE FRANKFURTER: Do you think it would make any difference to our problem if this record also contained the testimony of six professors from other institutions who gave contrary or qualifying testimony? Do you think we would be in a different situation?

MR. MARSHALL: You would, sir, but I do not believe that there are any experts in the country who would so testify. And the body of law is that even the witnesses, for example, who testified in the next case coming up, the Virginia case, all of them admitted that segregation in and of itself was harmful. They said that the relief would not be to break down segregation. But I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child. (44.p.59-60)

The High Consistency

A study of Chapter Nine will also show that the sixty social scientists we contacted have not only individually maintained a position consistent with their views of the early 1950's regarding segregation but they are remarkably compatible with each other on this point.

The group includes psychiatrists, psychologists, anthropologists, sociologists and educators representative of a large sampling of universities and professional centers. They used individual approaches, emphasized different aspects and drew in a wide range of evidence. But when it came to the psychological and social effects of segregation there was rather remarkable consistency in their conclusions and explanations. They did not all say the same thing, but what they said fitted well together in a

systematic pattern. In other words, as applied to segregation, social science theory has been not only generally stable from 1953 to 1968 but also consistent from discipline to discipline and from expert to expert. The findings and conclusions are mutually reinforcing rather than antagonistic. Nowhere in the arguments and cross examinations could defense lawyers point out substantial variations. They could only predict that it would change.

We have reported on the stability of the witnesses, signers of the appendix for the brief and a control group. What about the behavioral scientists in general?

At least three national professional groups have passed resolutions since 1960 which strike directly at scientific racism, the basis of pro-segregation arguments: The Society for the Psychological Study of Social Issues, a division of the American Sociological Association, and the American Anthropological Association. (13.p.89) The segregationists have been able to muster only "a small cadre of academic social scientists"

Although the scientific segregationists have published extensively and found space in such a periodical as U.S. News and World Report they are in no sense representative of any major professional group. They have drawn a line between the racists and hereditarians on one side and the equalitarians and environmentalists on the other. (13.,p.63-65) They have found comfort with right wing political organizations and received aid from their affiliated "educational" groups. (13.,p.221)

Social Science Arguments Unnecessary?

In one place Professor Cahn said the "moral factors" are "exceedingly ancient," in another place "universally accepted" and finally that they are continuously found in the "work of poets, novelists, essayists, journalists, and religious prophets."

We quote Professor Cahn further:

So one speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil. Mr. Justice Harlan and many other Americans with responsive consciousness recognized these simple, elementary propositions before, during, and after the

rise of "separate but equal." For at least twenty years, hardly any cultivated person has questioned that segregation is cruel to Negro children. The cruelty is obvious and evident. Fortunately it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by Plaintiffs' experts to demonstrate it "scientifically". (Emphasis Added) (3.)

But isn't Professor Cahn overstating the universality and the influence of the philosophers? In the Plessy v. Ferguson case he cited only the famous dissent of Justice Harlan,¹ not the opinion of the majority of seven! The humanists have always been with us, fortunately, but their influence did not seem to be felt in the Supreme Court on the evils of segregation between 1896 and 1954.

Dr. Cahn emphasizes that these humanistic values were already established by literature, philosophy and religion and did not require the help of so "young a science." But how consistently were those values recognized and followed?

Greek culture, the cradle of Western philosophy, was based on a slave society.

Without belittling the humanities in general it can be said that there have been numerous examples of the inhumanity of the humanities. Literature about the Negro has too often had an "Amos 'n Andy" flavor. The music and drama has been given a minstrel show quality. The Negro's own folk arts such as the spirituals have been regarded by many as mere entertainment by lowly people rather than appreciated on a high level.

Without belittling religion in general it should be recognized that the Bible has been quoted in support of the "divine institution" of slavery and the subsequent status of the Negro. As an institution the church generally followed the segregation lines of the community and was about as slow to integrate as the schools up to 1954. (Since then, however, the churches may have integrated faster.)

Were the behavioral scientists plunging through open doors? Hardly. The doors were closed tight in 1896 and had failed to open very widely in 1938 (Gaines), 1950 (Sweatt) and 1950 (McLaurin). Maybe the professors were more aggressive than the poets and more ready to spend a day in Court. Both humanists and social scientists now generally favor the decision. Regardless of who deserves the most credit for bringing it about, both are badly needed in helping to implement it.

¹Grandfather of the present Justice Harlan.

Encroachment on Law?

Does the reluctance to admit or accept the prominence of behavioral science in these cases stem partly from the resistance of one profession or academic discipline to what is perceived as the encroachment by another? Two of the South's legal champions following 1954 were Eugene Cook, Attorney General of Georgia, and William I. Potter, Attorney General of Missouri. They take an anti-science position and regard law as law, a field that has the right to examine other fields but has nothing to learn from them. In the aftermath of the segregation decision they wrote:

Under elementary and elemental law, a court may not consider treatises in a field other than law, unless the treatises themselves are the very subject of inquiry. The doctrine of judicial notice extends only to those things of common knowledge that lie without the realm of science. (5.)

This statement is obviously extreme and we do not present it as representative of the legal profession. Nor do we assume that tendencies toward inbreeding are not present in other professions and academic fields. However, it must be recognized that the extensive testimony in the segregation cases is one of the best examples in history of a half-dozen academic disciplines uniting very consistently on a major and complex social problem.

Although Jack Greenberg expresses caution about overemphasizing the importance of social science in the Brown case, he takes a much broader view than Cook and Potter and sees it in a serving role as an auxiliary of law:

Constitutional interpretation should include relevant knowledge. The Constitution turned on a moral judgment; but moral judgments are generated by an awareness of facts. (13.,p.191)

Professor Kurland of the University of Chicago explained his view of the opinion on a more expedient basis:

I feel strongly that it was a good opinion but that they were not honest in their statement of the reason that they were using. It is the sort of opinion you get on terribly important cases, where you think unanimity is more important than the content. (31.)

Segregationist Inconsistency

A major inconsistency developed among the segregationists following 1954. They first attacked the decision and especially the social science basis. Cook and Potter said:

Should our fundamental rights rise, fall or change along with the latest fashions of psychological literature? How are we to know that in the future social scientists may not present us with a collection of notions similar to those of Adolf Hitler and label them as modern science? (5.)

Next they concluded that if a decision could be reached by the social science route maybe they could get it reversed by applying their own brand of social science. Consequently they sought reversal in several cases at the district court level, using their small cadre of scientific racists as expert witnesses. They gained some judicial sympathy but no decision. (13.,p.192)

Finally, maybe there is a continuing general resistance in Western thought to applying science, natural or social, to humane values. Are value judgments and humane considerations gained by revelation and held in some sacred realm beyond the touch of scientific analysis and testing? We want to provide what is "good" for people. To determine what is "good" do we need social science along with philosophy, religion and literature? The Supreme Court seemed to say that they found help in the behavioral sciences in determining what the Constitution means now by "equal protection of the laws."

Social Science from "Plessy" to "Brown"

Before proceeding further with the place of social science in the Brown case we need to go back 58 years to Plessy v. Ferguson (59.) and the separate but equal doctrine of 1896. The key statements in the Plessy decision are obviously based on the social and psychological assumptions of the time. Whether or not these assumptions can be properly called "behavioral science" is a quibble about historical definition. We first quote from the opinion of the Court delivered by Chief Justice Brown for a majority of seven. (Justice Brewer did not participate):

Opinion of the Court

...A statute which implies merely a legal distinction between the white and colored races--a distinction which is founded in the color of the two races, and which must always exist so long as white men are

distinguished from the other race by color--has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

...The object of the (Fourteenth) Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

...Laws forbidding the intermarriage of the races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state.

...We consider the underlying fallacy of the plaintiffs argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.

...It is true that the question of the proportion of colored blood necessary to constitute a colored person as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible

admixture of black blood stamps the person as belonging to the colored race...others that it depends upon the preponderance of blood...and still others that the predominance of white blood must only be in the proportion of three-fourths...¹ But these are questions to be determined under the laws of each State and are not properly to put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored races. (Emphasis Added.)

Next, we give the key quotations from the famous dissent by Justice John Marshall Harlan, grandfather of the present Justice Harlan:

Mr. Justice Harlan Dissenting

...Thus the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

...In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.

...But that amendment (Thirteenth) having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty.

...These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems.

¹Plessy was seven-eighths white. He could never have been identified as a Negro except for the efforts of the local genealogists who made sure that the train conductor and the courts were fully informed on his ancestry.

...It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, ~~as to exclude white persons from railroad cars occupied by blacks~~, as to exclude colored people from coaches occupied by or assigned to white persons.

...The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest man is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.

...The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between the races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.

...The result of the whole matter is, that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit the white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition" when in the same passenger coach. (Emphasis Added.)

The Men Behind the Plessy Opinions

Professor Henry J. Abraham describes Chief Justice Brown¹ as "a Michigan Bramin, born in Massachusetts and educated at Harvard and Yale." (1.,p.10) (We do not mean to indict the whole Ivy League.)

The first John Marshall Harlan is one of the unique personalities in American History. In background and legal and social philosophy he stands in sharp contrast to Chief Justice Brown who spoke for the majority of seven.² Harlan, a Kentuckian and former slave holder, recruited a Union infantry regiment. He opposed the adoption of the 13th Amendment. Instead of Yale and Harvard, he attended ~~Center~~ College and Transylvania University in Kentucky. He was on the Supreme Bench for 34 years (1877-1911), the third longest tenure in history. He was one of the greatest of the dissenters, standing consistently for the common man and minority groups. He was often right too soon, especially in civil rights cases.³ He was not other-directed and was at his best in dissent unencumbered by rhetoric and precedent. His language was not cautious or subtle, but instead, clear, sharp, sometimes harsh and generally loaded with picturesque phrases and common sense: viz. "The Constitution is color blind;" "the law regards man as man;" "the curse of bigness."

¹There happen to be three key people by the name of Brown in these cases: Chief Justice Brown who delivered the Plessy decision, the Oliver Brown plaintiff in Topeka and Esther Brown of Kansas City who promoted the curtain-raising South Park case in Kansas and was instrumental in starting the Topeka case. (Chapter II)

²Many of Justice Harlan's assumptions are implicit in the Warren decision of 1954.

³Seldom does a Justice live long enough to see his dissent become the majority opinion. But Justice Black has lived to see his famous dissent in Betts v. Brady, 316 U.S. 455(1942) reversed by Gideon v. Wainwright, 372 U.S. 335(1962). The two cases involved the issue of competent counsel for all defendants regardless of their economic circumstances. Justice Black was given the privilege of writing the majority opinion of 1962 incorporating the basis of his dissent of 1942.

William Ming points out that Harlan was a "tabacco chewing, whiskey drinking, poker playing, evil old man." (34.)

When it comes to colorful language, clear thinking, championing underdogs and disregarding Bramin niceties, Harlan shares honors with several other famous citizens from Kentucky and nearby Illinois and Missouri: Andrew Jackson, Abraham Lincoln "Veep" Alban Barkley, and Harry Truman. May their breed never disappear from the American scene!

Social Science Behind Plessy

The Plessy decision, establishing the separate but equal principle, was narrowly decided on the basis of railroad transportation. In fact, it applied only to northbound trains. But through the years the principle was spread over practically all areas of inter-racial relations including public accomodations and education. Naturally, the white majority enforced "separate" far more meticulously than "equal." It is well to examine the Plessy v. Ferguson case in the light of the cultural assumptions and the stage of the social sciences in the 1890's. The separate disciplines had not yet developed systematic theories. The social sciences had not yet become experimental. They had not permeated educational curricula. Anthropology was in its infancy. Sociology, psychology and political science were still young off-shoots of philosophy, religion and history. They are probably more accurately viewed as reflections of the social thought of the times than developers of it.

William Graham Sumner (1840-1910) was one of the most prominent social scientists of the time. Educated at Yale and in Europe he became an Episcopal Priest and later Professor of Political and Social Science at Yale (1872-1909). A prolific writer, he did much to crystalize the social thought of his generation and contribute to it. His influence was long lived. The theme of his "Folkways" (1906) and his unpublished notes became the basis of the four volume work, Science and Society, edited by A.G. Keller in 1928.

In his many essays and lectures Sumner reflected a Puritan-frontier-individualistic philosophy. Subscribing to Social-Darwinian theory he believed in rugged competition for the elimination of the ill-adapted. Consistently he also believed in cultural vigor and racial soundness. Paternalism and the anticipated drift toward a welfare state were abhorant to him. The middle class ethics of discipline, hard work, thrift, and sobriety were the basis for a good family and a good society. His emphasis on human instinct and heredity made him rather fatalistic about upward mobility, individual reform and change in folkways.

This is a brief and over-simplified summary of the Sumner social philosophy as representative of the time. It had many roots. In modified forms it has persisted well into the Twentieth Century and is still discernable in some political talk. (6.)

Mores and social attitudes are often invested with religious sanction. This tends to shut them off from open inquiry and re-examination.

In such a social philosophy the Negro was not likely to come off very well. He was an ex-slave. He was considered racially inferior. His poverty, ignorance and low status were seen as a natural result of his indolence and inherent inferiorities. He was the victim of a thought continuum that might be labeled: expectation-creation-blame. That is, the dominant white society expects the Negro to be that way, helps make him that way and then blames him for being that way.

Undermining the Plessy Case

We have seen that social philosophy, if not social science, was involved in the "separate but equal" decision. Even some of the lawyers who question the real importance of social science considerations by the Supreme Court in 1954 grant that the many pages of testimony and argument in this area at least stuck successfully at the underlying social assumptions and philosophy of the Plessy decision.

Social science developed a great deal from 1896 to 1950. The concept of race and effects of segregation had changed decidedly. By 1950 a sizeable and representative group of leading academicians had been able to reach general agreement about racism and the evils of segregation. Since then this professional attitude has been characterized by stability, consistency and reinforcement by research. The future will bring changes through research and theory but there is no present sign of any reversal of opinion on the evils of segregation.

Jack Greenberg,¹ who as counsel for the NAACP, helped argue the case at Topeka, said:

I would hate to see the notion continued...that social science was the key to the whole thing, because I do not think it was...Unfortunately the general public has uncritically accepted the notion that the social scientists sort of persuaded the Court. This somewhat downgrades the Court because, after all, it was a law court.

¹The only white lawyer who helped argue one of the segregation cases. Many white lawyers helped in the preparation.

Although regretting any extreme or naive assumptions about dominance of the social sciences in the segregation cases, Greenberg did point out a major contribution. He differed with Edmond Cahn's criticism of the social scientists and referred to the thesis of Dean Pollak of Yale, namely that the social science testimony had removed the justification for segregation perpetuated by the Court in the Plessy case. Agreeing with Warren's reference to the state of psychological knowledge of 1896, Greenberg said:

Essentially what this (social science testimony) did was take (the old psychological justification) out. It sort of neutralized it. Then we had a legal decision based on a set of legal documents...It is essentially confirmed what you knew as a matter of common sense...It does not make sense if you stick somebody off in one corner because of his race. It is going to hurt him. That was its (social science) role.

Greenberg explained further that the use of social science testimony had been unusually extensive but not a novelty. "The Brandeis brief type of material appears in decisions with some regularity. Almost invariably they serve another function and that is to show the reasonableness of legislation." Mr. Greenberg agreed that the social sciences at least helped to define what was "equal protection of the laws." (26.)

Kenneth Clark said, "I am fascinated when I hear people say that this is a social science decision and am flattered because of whatever role I played in it...except that I would like to point out to you that Footnote 11 which dealt with the behavioral science basis for the (decision) was only one of many footnotes..." He agreed later however, that the number of footnotes is not necessarily a valid measure of emphasis.

The New Element

Dr. Clark referred to the Warren statement that "Any language of Plessy v. Ferguson contrary to this finding is overruled," and continued:

I think it is fair to say that the Court in overruling Plessy v. Ferguson did lean on the psychological knowledge...This seems to me to make sense... Actually, you can't overrule a legal precedent by resorting to that same legal precedent...Surely, the new element was the whole body of social science... research which we brought together in the testimony by expert witnesses...and the summary...we presented in the social science appendix. (22.)

Speaking on the same theme, Thurgood Marshall said, "The whole basis (of Plessy v. Ferguson) was that it did not hurt anybody." The social scientists showed how it hurt. I asked Mr. Marshall, "Do you suppose it helped the Court to reason thus: We can not settle it on the (historical and legalistic) ground, we will have to settle it on behavioral science?" Mr. Marshall replied, "The tough ground..It's the only way I can see."

When I suggested that the important new element that came in- to the Brown v. Topeka case was the behavioral science argument, that segregation in and of itself is psychologically and socially bad, he replied, "No question about it in my book." (32.)

On May 25, 1954, a typical letter of appreciation was sent by Marshall to Dr. Frederick Wertham, Director of the LaFargue Clinic in New York. Dr. Wertham had testified in the Delaware case. It said in part:

I hope that you and the members of your clinic will have satisfaction in knowing that your great efforts contributed significantly to the end result. Not only was your testimony in the Delaware case before the Court in the printed record of testimony, but the Chancellor in Delaware came to his conclusion concerning the effects of segregation largely on the basis of your testimony and the work done in your clinic.

In terms of space and emphasis, behavioral science seems to be the major theme of the decision. Three of the six cases cited included a great deal of behavioral science testimony and argument. The handicaps of separation and humiliation found in the Sweatt and McLaurin cases were seen by the Chief Justice to apply with "added force to grade and high school students."

The statement of the Kansas Court on the "detrimental effect of segregation...especially when it has the sanction of law" cited above was included. Then the Chief Justice said:

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected...Separate educational facilities are inherently unequal.

Indirect As Well As Direct Influence

The social sciences seem to have been of direct help as the important new element. They no doubt were also of some indirect help. In the Supreme Court hearing, Justice Frankfurter several times spoke of "reasonableness." Social science may have helped clarify the reasonableness. The use of race as a basis for classification put a burden of proof on the states to show natural differences that could not stand against the authority of Redfield and others. Social science had developed new meaning for communication and could not tolerate isolation as anything but a barrier to learning. Educators had developed a comprehensive theory of curriculum that included the total learning experience. It could not be equal if the Negro child was shut off from normal contacts with representatives of 90% of the population. Likewise, segregation deprived the white child of the ready-made opportunity of learning from another culture as the anthropologist could well point out. The social conscience of the nation was developing partly because of the knowledge and attitudes taught by the social sciences.

The Court Makes It s Choice

Thurgood Marshall presented three choices to the Court as a basis for a decision in favor of the Negro: (Chapter Seven)

1. Apply the narrow principle of the Sweatt case to public education as well as to the universities.
2. Declare that race is not a justifiable basis for classification.
3. Recognize that modern social science shows segregation to be ~~h~~ harmful and a denial of equal protection of the laws.

Whether the members of the Court meant it or not, the wording of the decision indicates that they took the third choice.

Speaking as a Negro parent, Thurgood Marshall put it simply, "As it came out, equal meant equal and I guess that's the way I said it in one of our cases. The only way I could be sure my kid was getting an equal education was for him to be in the same room." (32.)

The Progress of Integration

During the Supreme Court hearings the Justices frequently showed concern about the consequences of an anti-segregation decision. Anticipating public resistance, the Chief Justice had worked hard to gain the solidarity of a unanimous Court.

After the follow-up hearing in 1955, the Court took a conservative position on timing by using the famous phrase "all deliberate speed." The American system of division of powers left implementation of the decision to the legislative and executive branches. Yet, as Jack Greenberg points out, it was the judicial branch which carried the banner for desegregation ten years following Brown v. Topeka. Not until 1964 was congressional and presidential support forthcoming. Mr. Greenberg writes:

In the early legal battles, the courts had to suppress a series of rebellions more serious than those which wracked the nation last summer (1967) because they were conducted under the auspices of public officials and sought to legitimize lawlessness in the name of the law. Little Rock was a prototype. These were nothing less than challenges to the integrity of the Union. The courts succeeded in upholding the principle of the school segregation cases against great odds. President Eisenhower pointedly refused to endorse the correctness of the desegregation decision, and a Congress not only refused, but came within a hair of chopping down the Court's jurisdiction in retaliation. President Kennedy expressed agreement with the Court, but not until Congress passed the 1964 Civil Rights Act did it advance to a position abreast of the President and the Supreme Court. ¹ (8., p. 57)

President Eisenhower did not openly take the attitude that Andrew Jackson once did by saying that the men of the Court had made their decision, so let them enforce it. However, during his press conference on August 27, 1968, he fielded a question concerning implementation in his characteristic literary style, showing an attitude similar to that of his nineteenth century predecessor:

I might have said something about "slower," but I do believe that we should--because I do say, as I did yesterday or last week, we have got to have reason and sense and education, and a lot of other developments that go hand in hand as this process--if this process is going to have any real acceptance in the United States.

It is not the purpose of this history to trace the progress of school segregation since 1954. That is done in the several commission reports and elsewhere. Although there has been some acceleration since 1964, statistically the results are still meager.

¹ Reprinted from "The Tortoise Can Beat the Hare" by Jack Greenberg with permission of the author and Saturday Review. Copyright © 1968 by Saturday Review, Inc.

William L. Raynor, staff-director for the 262-page study of the U. S. Civil Rights Commission (1967) reported that "we have educated a whole generation in schools that are inferior." The "vast majority" of the Negro school generation of the twelve years from 1955 to 1967 did not "attend a single class with a single white student." The Negro population of the South was increasing faster than desegregation. The ghettos of the North were becoming more congested and more turbulent. (14., p.43)

School boards and administrators have too often moved no faster than forced to. In 1966, after a floor debate, the National School Boards Association substituted the milder phrase "leadership role" for "major responsibility" in its resolution about "removing the barriers which prevent educationally deprived children...from full access to the educational opportunities provided at public expense." (9., April 26, 1966)

Too many board members, administrators, and teachers and the public whom they represent still do not realize the degree of psychological and sociological damage to both whites and blacks. To paraphrase Portia's mercy speech in the Merchant of Venice: "Segregation is twice cursed. It curses him that segregates and him who is segregated. Conversely: Integration is twice blessed. It blesses him who integrates and him who is integrated." Much more effort is needed from the humanities, the social sciences and law.

Impact and Signs of Change

But the Brown v. Topeka case has had a great general impact. It was the first of a series of decisions on human rights by the Warren Court. Congress followed the Civil Rights Act of 1964 with the Fair Housing Act of 1968. The Negro Revolution has gained momentum in both its violent and non-violent aspects. Historical movements do not have single causes or single effects but the 1954 decision stands out as the most conspicuous event in the struggle for Negro rights.

There are many signs of change. For example, I can now go to Topeka and have lunch with Negro attorney Charles Scott in any restaurant of our choice. His son can play football and enter other activities at Topeka High School. Massachusetts has sent the first Negro to the U.S. Senate. Whereas Justice McReynolds (1914-41) who had dissented on both the Scottsboro and Gaines cases turned his swivel chair around so as to keep his back to the first Negro attorney who appeared before the Supreme Court, now is a Negro lawyer who won forty-four out of fifty-two cases before the court sits on its bench. The events recorded in the University

cases of two decades ago seem incredible to us today: The slow integration of students and faculty at Missouri, the sham law school in Texas and the classroom barricades in Oklahoma. At Topeka, the defense held social customs established by the majority above constitutional rights and maintained that segregation was an incentive to Negro achievement. Such arguments are seldom heard publicly today. Negroes are appearing more frequently on stage and television and dare hold hands with whites on Emmy night. Newspapers such as the Kansas City Star are no longer reluctant to print pictures of Negroes. The clergy are frequently organized for civil rights efforts.

Implications for the Future

The Frankfurter memo circulated among the Justices prior to the announcement of the decision stated that the "way we do it" may be as important as "what" we do. (Chapter Seven) Both the decision itself and the way it was arrived at have important implications for the future.

An Example for Social Action

At Topeka in 1951, a small group of courageous Negroes were assisted by a few white people from Kansas City. The local plaintiffs were willing to state their grievance in public. The case, prepared according to a pattern being evolved by the NAACP, was presented by a half dozen college professors who had never been in Federal Court and four young lawyers. For years the Negro had been blocked by legislation, school policy, administrative action, the "customs of the people" and his own self-concept. But he finally found open to him the judicial process for interpreting a living constitution.

The following exchange between Felix Frankfurter and Thurgood Marshall in the Supreme Court is significant here:

MR. MARSHALL: I think, sir, that so far as the decisions of this Court has repeatedly said that you cannot use race as a basis of classification.

JUSTICE FRANKFURTER: Very well, if that is a settled constitutional doctrine, then I do not care what any associate or full professor in sociology tells me. If it is in the Constitution, I do not care about what they say. But the question is, is it in the Constitution? (44.,p.62)

We can infer that although there was still a question as to whether or not it was in the Constitution even the reluctant Mr. Justice Frankfurter was ultimately helped in finding it there by the "associate and full professors."

As agreed by most of the social science respondents to the questionnaire reported in Chapter Nine, the Brown case suggests greater possibilities for using the judicial route with the help of modern enlightenment for the benefit of humanity.

An Affirmative Obligation?

The idea of protecting man from the oppressions of government came out of the political philosophy of the eighteenth century which was dominated by powerful monarchies. But idea of governments protecting man from the inhumanity of man was not well realized until the twentieth. The American Constitution was drafted during a period in history when governments by their nature were considered oppressive and therefore constitutional safeguards were adopted as restraints. Many negative clauses and prohibitions were included and promptly recognized. However, a number of less conspicuous affirmative requirements were also included which the people have been slow in finding and using. The Preamble states several positive purposes, but as Harry Truman has pointed out in his speeches on the presidency, it took 150 years for the people to discover the word "welfare" there. Similarly, in the Fourteenth Amendment, the "due process" clause was discovered as a safeguard for property rights by corporation lawyers much earlier than the "equal protection" clause was discovered by civil rights groups.

Professor Kalven pointed out:

The desegregation cases brought back into the forefront the "equal protection" clause, which until then had been almost a dead letter...from the time of the promulgation of the Fourteenth Amendment...Holmes almost referred to the equal protection clause as a last resort of a lawyer who had a terribly weak case. He did not say the last resort of a scoundrel, but that is certainly what is implicit in his statement...(In regard to the "equal protection" clause) the viable standard of state government conduct really begins for all practical purposes with the Brown case. So, to that extent, it had a very important effect. (30.)

Sins of Omission

During the interview with Thurgood Marshall on April 3, 1967, I asked him about sins of omission by Boards of Education. I recalled that the defense at Topeka argued that the Board of Education had no obligation for safety precautions at busy intersections or to make sure that children had adequate books. That was left up to poor or non-existent Negro P.T.A.'s. Specifically I asked Mr. Marshall about the obligation of school boards to make reasonable inroads on de facto segregation:

MR. MARSHALL: Well, the argument is constantly made that there is no compulsion in the Fourteenth Amendment to segregate. The compulsion is not to segregate.

DR. SPEER: But a sin of omission, letting it happen?

MR. MARSHALL: Right, well, that is coming close now. I would say that in a couple of years the free world is going to face up to it. Failure to provide the necessary state machinery to assure equal protection of the laws is in and of itself a denial of equal protection of the laws. I assume such an argument can be made.

DR. SPEER: And it may come up through the Courts before too long?

MR. MARSHALL: I don't know when or where, but I can see it coming.

DR. SPEER: That would be another accidental five cases?

MR. MARSHALL: Sure, bet you I'd be in the middle of it! (32.)

This was a prophetic statement. Within three months Judge Skelly Wright of the U.S. Court of Appeals in the District of Columbia handed down a decision abolishing the track system in the District and requiring positive action in correcting some of the inequalities resulting from de facto segregation. And Thurgood Marshall was appointed to the Supreme Court where he definitely "would be in the middle" of any appeal of this issue!

Are we approaching an era in which states and their subdivisions will be required to extend "equal protection of the laws" not only against discrimination but also against ignorance, illness, rats, poverty, humiliation and despair?

The Kansas Court excused the Board of Education for some minor inequalities because they were not deliberate and willful but Judge Wright was tougher:

School officials can and should be faulted...for another reason: that in the face of these inequalities they have sometimes shown little concern.

Mr. Justice Whittaker, sometimes called a lawyer's lawyer takes the older view and believes that the Supreme Court has no right to deal with sins of omission. (39.)

Professor Kalven points out that, "The Supreme Court has not yet decided that there is an affirmative obligation on the part of the states..."

But the wording of the Warren decision seems to point to an affirmative interpretation:

Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship...a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (49.)

If "education is perhaps the most important function of a state" and "is a right which must be made available to all on equal terms," then a number of positive actions may be required of the states in the future.

Economic "Walls"

Even with the various programs of state and federal aid to education, the district expenditure per child can vary as much as three to one within a state and even more among the states. Both common sense and research generally show a high correlation between cost and quality of education. (16.) With annual expenditure per child ranging from as little as \$250, to as much as \$1,000, there can be no question about inequality.

The wealthier states and the wealthier districts within the states naturally resist equalization. This makes adjustment by the legislative route difficult.

The Brown v. Topeka case becomes a likely precedent. At one point in the Supreme Court Mr. Justice Reed asked:

I am thinking of whether it is a problem of the legislative or the judiciary?

Thurgood Marshall replied: "I think, sir, that the ultimate authority of the asserted right by an individual or a minority group is in a body set aside to interpret our constitution, which is our Court."

The Court agreed.

Ten years later it was noted by the Court that some state legislative districts had far more representation per voter than others. Legislators so elected naturally would not give up their advantage by voting for equalized representation. Therefore it was up to the Supreme Court to establish the principle of "one man, one vote." (Reynolds v. Sims, 377 U.S. 533(1954))

A logical sequence may be "equal education, equal support."

One city superintendent has been quoted as saying:

The notion that only integrated education can make for quality education is a myth that needs to be exploded.

Judge Wright sharply disagrees. Citing the U.S. Commission on Civil Rights and the U.S. Office of Education research he found:

Racially and socially homogeneous schools damage the minds and spirit of all children who attend them--the Negro, the white, the poor, and the affluent--and block the attainment of the broader goals of democratic education, whether the segregation occurs by law or by fact...The scholastic achievement of the disadvantaged child, Negro and white, is strongly related to the racial and socioeconomic composition of the student body of his school. (7.)

There is ample support for this statement in the Brown v. Topeka testimony.

It would be hard to simply declare de facto segregation illegal amidst the complexities of our current society, but Judge Wright found such discrimination "of very shaky status, morally, socially and constitutionally." Other lower courts have taken positions generally opposite to that of Judge Wright. Sooner or later, it can be expected that certiorari will be granted one or more cases involving these issues.

For the child who is confined by ghetto walls and educational "tracks" or arbitrary "ability groups", the problem of equality becomes staggering. In the District of Columbia, Judge Wright found in 1967 that the "track" system, so highly touted during the post-Sputnik era, unfairly relegates poor and Negro pupils to

"blue collar" programs. He ordered the tracks abolished. Will courts someday take the same attitude toward some other forms of ability grouping? A good number of the respondents to our questionnaire (Chapter Nine) think it possible but generally prefer to see the educational profession beat the courts to such issues. Judge Wright agreed:

It is regrettable, of course, that in deciding the case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government.

The Role of Education

Most educators recognize that their greatest unsolved problem is crossing the cultural lines and reaching lower-class children. This group comprises a fourth to a third of the school population. It roughly corresponds to the high school drop-out group.

The problem calls for not only greater effort but another kind of effort. The task is well described by the paradoxical statement: "There is nothing so unequal as to treat unequals equally." For example, standardized texts, procedures and time schedules are generally ineffective when prescribed for large, diversified cities.

When the school becomes more flexible and more individualized, recognizes more directions for socially desirable growth and utilizes heterogeneous group experiences more advantageously, all children will benefit. In other words, when American educators learn to make education more effective for the lower-class child they will have learned to make education more effective for all children.

The expertise required for this can best come from the educators and social scientists generally. But the courts will probably have to push for equality of financial support, social environment and health service along with removing the social confinements and obstacles.

The social scientists and others have already put a great deal of enlightenment on record with the courts. They will no doubt be asked to continue to do so as their theory and applied skills evolve. Disadvantages arising not only from race but from social

and economic conditions will continue to come up for consideration under the "equal protection" clause. The Brown v. Topeka case will be the important precedent, not only the decision itself, but the process by which it was achieved.

SUMMARY

The Case of the Century

This study aims to record the political, sociological, psychological and legal aspects of the school segregation cases by using court records, testimony, recent opinions of sixty social scientists and interviews with thirty judges, lawyers, witnesses and plaintiffs who were involved.

The Negro first won a series of four university cases in which the Supreme Court "whittled away" at segregation without striking down the "separate but equal" doctrine established in Plessy v. Ferguson in 1896. In 1938, Lloyd Gaines objected to the Missouri policy of requiring Negroes to attend law school in neighboring states and sought admission to the state university. Although Chief Justice Hughes presented a majority decision in his favor, Gaines completely disappeared, giving Missouri time to establish a separate and no doubt unequal law school. When Ada Sipuel sought admission to the Oklahoma law school in 1948, Thurgood Marshall pointed out to the Court among other things, that the state penitentiary had more books than the mushroom Negro law school, and the Supreme Court agreed that the separate facilities at the University level were not equal. McLaurin was finally admitted to the Oklahoma graduate school but at various stages required to sit in an ante-room, behind barricades, and at separate tables in the cafeteria and library. Students peacefully protested by tearing down the barricades and sitting with him. The Supreme Court under Chief Justice Vinson decided unanimously in 1950 that such isolation interfered with the normal communication essential in graduate work. In the Sweatt case, in Texas, the Court found that a separate Negro facility was sure to lack those elements that made for "greatness in a law school."

With the help of over 100 lawyers, social scientists and a number of courageous plaintiffs and interested citizens, the NAACP won three university and five public school cases from 1949 to 1954. According to Thurgood Marshall the selection of the cases was "sheer accident" but the variety formed such an effective pattern that they seemed strategically chosen.

"Why Kansas"? was naturally asked. This Puritan-Yankee state had permissive segregation in elementary schools of first class cities but "forbad" such "discrimination" elsewhere. There

seemed to be a noticable gap between the state's Puritan-Yankee tradition and democratic-Christian verbal declarations on one hand and actual acceptance of the Negro on the other. School board policy was characterized by resistance and intimidation. The visible facilities were admitted to be approximately equal in Topeka except for buildings and books which the District Court did not consider significant or deliberate. Testimony on Negro students' handicap of being isolated from representatives of 90% of the national population and the social and psychological damage to personality engendered by segregation were noted by the Kansas Court in a significant paragraph later quoted in Chief Justice Warren's decision. In 1967, the presiding judge in Kansas, ex-governor, Walter A. Huxman, said:

We tried to put the decision up there in a way that the Supreme Court couldn't duck. Had it not been for that case (Plessy v. Ferguson) we would have stricken down the ordinance ourselves. The Supreme Court had refused to overrule it completely and we thought it was their job...if I had been on the Supreme Court, I would have voted to reverse it.

The author participated in the Topeka case and therefore has been able to reconstruct that inside story more fully than the others.

In South Carolina the defense argued that the segregation issue was state rather than federal, legislative rather than judicial. Judge Parker's opinion for the majority of the court said:

It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States and great judges of high courts, have knowingly defied the Constitution for so long a period, or that they have acted in ignorance of the meaning of its provisions. .

In answer to this, Judge Waring wrote one of the greatest dissents in judicial history, citing testimony of the social scientists who spoke against segregation in South Carolina.

Behavioral science witnesses were produced by the defense only in Virginia. Although they thought prompt integration impractical, on cross examination, they almost all admitted the psychological and social evils of segregation. The late Professor Cahn of the New York University Law School pointed out that the defense lawyers succumbed to the "sickness of Southern society" and were very inept at dealing with the social science arguments.

The Negroes won only in Delaware, where both the Chancery and state Supreme Court found a violation of present and personal rights because of unequal facilities. The decision decried segregation in principle but left the big issue for the Supreme Court.

The District of Columbia case had been "festering" for years and was called up by the Supreme Court which seemed more mindful of the situation than Congress.

The five cases were first heard by the Supreme Court in December, 1952, under Chief Justice Vinson. Six months later, the Court asked both sides and the Attorney General to bring in evidence on five questions for a rehearing in the October term, 1953. The first three questions dealt with legal precedent, the intent of the Fourteenth Amendment and the understanding in the legislatures which ratified it.

After the hearings on these questions in December, 1953, the new Chief Justice, Earl Warren, concluded that: "Although these studies were of some help, they were indecisive at best," largely because public education was in its infancy in the North and practically non-existent in the South at the time the Fourteenth Amendment was being proposed.

The question of mootness came up in the Kansas case at the second hearing because Topeka had announced a plan for gradual integration. However, Kansas had to defend her statute or admit its invalidity. Both sides claimed an issue. Chief Justice Warren ruled that it was not moot.

The most dramatic clash was between Thurgood Marshall and John W. Davis, probably the most prestigious lawyer in America at that time. The main emphasis was on segregation per se. The Justices, especially Frankfurter, asked many pertinent questions which were skillfully handled by Marshall and others. The questions showed concern about the consequences, the legislative and judicial prerogatives and states' rights, but interpretation of the "equal protection clause" became the key point. Marshall suggested three choices to the Court: (1) the narrow decision in the Sweatt case showing the difficulty if not impossibility of "separate" being "equal"; (2) race as an invalid basis for classification and (3) the psycho-social damage resulting from a denial of equal protection of the laws required by the Fourteenth Amendment. Legally the Court could have used the first or second choices years before. But they had not. The third choice seemed to be the basis selected in 1954, according to the wording of the opinion. Kenneth Clark and Thurgood Marshall agree that social science was the new ingredient that made the difference.

The social science testimony was varied but consistent. The following points were emphasized. No basis was found for a belief in inherent differences between the races. Any gap between the two is attributed to environment. This makes any legal classification on the basis of race "especially odious." A number of the witnesses cited experimental evidence showing that segregation gives the Negro a "badge of inferiority." Kenneth Clark's famous doll test showed that even very young children associated "badness" and rejection with the black dolls. This kind of self-concept becomes an obstacle both to learning and to normal social development. Segregation tends to cause either withdrawn or hostile personalities. The gulf between the verbalisms about equality, brotherhood and democracy on one hand and the actual treatment received by Negro children on the other hand puts them in serious conflict. With the racist attitude, whites expect Negroes to be inferior, make them that way and then blame them for being that way.

The social sciences were attacked during and following the trials as "too young," shifting and flimsy. A questionnaire returned by nearly all surviving witnesses, signers of the social science statement appended to the brief and a control group show decisively that these sixty leading social scientists have not shifted their view since the early 1950's, but now have more scientific evidence to back up their conclusions regarding segregation. They have been not only stable for two decades but highly consistent with each other.

The decision is still very controversial. Was it right? Was social science a major factor? Is it a proper factor? Were not such views of justice already established by ancient philosophy, religion and the humanities? The Plessy decision had been based on humane values and social assumptions of the 1890's commonly held by William Graham Sumner and others, namely that segregation was natural and "did not hurt anybody." Modern social science showed that it did, and the equal protection clause seemed to be violated.

Chief Justice Warren worked hard to gain the unanimous decision of 1954. Some lawyers call the basis a low common denominator but the wording calls forth the equal protection clause against psychological damage described by "modern authority".

The implementation decision of 1955 used the famous phrase "all deliberate speed", attributable to Frankfurter. It was probably a compromise. Moderation was urged by the Justice Department of a cautious Eisenhower administration. The federal government did little to implement the decision until the Kennedy

days and the passage of the Civil Rights Act of 1964 during the Johnson honeymoon. Statistically, integration has been very slow.

But the Brown v. Topeka decision has had great impact. The Warren Court has followed with a series of other liberal, civil rights decisions. Legislation has covered public accommodations and fair housing. Examples of progress are evident.

Political philosophy of the eighteenth century emphasized the protection of many against the oppression of government as manifested in the American Constitution. But in the twentieth century the "welfare" clause and the "equal protection" clause have been discovered and reinforced by the new ingredient, social science. In the near future the judicial route may be used to gain equal educational expenditure per child, to make positive inroads on de facto segregation and to overcome other environmental handicaps. "The Case of the Century" will continue to be the important affirmative precedent, both the decision itself and the way in which it was achieved.

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APPENDIX A

IN THE
Supreme Court of the United States
October Term, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE
EMMANUEL, *et al.*,
Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY,
KANSAS, *et al.*

No. 101

HARRY BRIGGS, JR., *et al.*,
Appellants,

VS.

R. W. ELLIOTT, Chairman, J. D. CARSON, *et al.*, Members
of Board of Trustees of School District No. 22, Clarendon
County, S. C., *et al.*

No. 191

DOROTHY E. DAVIS, BERTHA M. DAVIS and INEZ D. DAVIS,
etc., et al.,
Appellants,

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY,
VIRGINIA, *et al.*

APPENDIX TO APPELLANTS' BRIEFS

**The Effects of Segregation and the Consequences of
Desegregation: A Social Science Statement**

Statement of Counsel

The following statement was drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations. It represents a consensus of social scientists with respect to the issue presented in these appeals. As a summary of the best available scientific evidence relative to the effects of racial segregation on the individual, we file it herewith as an appendix to our briefs.

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THURGOOD MARSHALL,
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Counsel for Appellants.

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I

The problem of the segregation of racial and ethnic
groups constitutes one of the major problems facing the

American people today. It seems desirable, therefore, to summarize the contributions which contemporary social science can make toward its resolution. There are, of course, moral and legal issues involved with respect to which the signers of the present statement cannot speak with any special authority and which must be taken into account in the solution of the problem. There are, however, also factual issues involved with respect to which certain conclusions seem to be justified on the basis of the available scientific evidence. It is with these issues only that this paper is concerned. Some of the issues have to do with the consequences of segregation, some with the problems of changing from segregated to unsegregated practices. These two groups of issues will be dealt with in separate sections below. It is necessary, first, however, to define and delimit the problem to be discussed.

Definitions

For purposes of the present statement, *segregation* refers to that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic origin, or linguistic group and those of other groups, which results from or is supported by the action of any official body or agency representing some branch of government. We are not here concerned with such segregation as arises from the free movements of individuals which are neither enforced nor supported by official bodies, nor with the segregation of criminals or of individuals with communicable diseases which aims at protecting society from those who might harm it.

Where the action takes place in a social milieu in which the groups involved do not enjoy equal social status, the group that is of lesser social status will be referred to as the *segregated* group.

In dealing with the question of the effects of segregation, it must be recognized that these effects do not take place in a vacuum, but in a social context. The segregation of Negroes and of other groups in the United States takes place in a social milieu in which "race" prejudice and discrimination exist. It is questionable in the view of some students of the problem whether it is possible to have segregation without substantial discrimination. Myrdal¹ states: "Segregation * * * is financially possible and, indeed, a device of economy only as it is combined with substantial discrimination" (p. 629). The imbeddedness of segregation in such a context makes it difficult to disentangle the effects of segregation *per se* from the effects of the context. Similarly, it is difficult to disentangle the effects of segregation from the effects of a pattern of social disorganization commonly associated with it and reflected in high disease and mortality rates, crime and delinquency, poor housing, disrupted family life and general substandard living conditions. We shall, however, return to this problem after consideration of the observable effects of the total social complex in which segregation is a major component.

II

At the recent Mid-century White House Conference on Children and Youth, a fact-finding report on the effects of prejudice, discrimination and segregation on the personality development of children was prepared as a basis for some of the deliberations.² This report brought together the available social science and psychological studies which were related to the problem of how racial and religious pre-

¹ Myrdal, G., *An American Dilemma*, 1944.

² Clark, K. B., *Effect of Prejudice and Discrimination on Personality Development*, Fact Finding Report Mid-century White House Conference on Children and Youth, Children's Bureau, Federal Security Agency, 1950 (mimeographed).

judices influenced the development of a healthy personality. It highlighted the fact that segregation, prejudices and discriminations, and their social concomitants potentially damage the personality of all children—the children of the majority group in a somewhat different way than the more obviously damaged children of the minority group.

The report indicates that as minority group children learn the inferior status to which they are assigned—as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole—they often react with feelings of inferiority and a sense of personal humiliation. Many of them become confused about their own personal worth. On the one hand, like all other human beings they require a sense of personal dignity; on the other hand, almost nowhere in the larger society do they find their own dignity as human beings respected by others. Under these conditions, the minority group child is thrown into a conflict with regard to his feelings about himself and his group. He wonders whether his group and he himself are worthy of no more respect than they receive. This conflict and confusion leads to self-hatred and rejection of his own group.

The report goes on to point out that these children must find ways with which to cope with this conflict. Not every child, of course, reacts with the same patterns of behavior. The particular pattern depends upon many interrelated factors, among which are: the stability and quality of his family relations; the social and economic class to which he belongs; the cultural and educational background of his parents; the particular minority group to which he belongs; his personal characteristics, intelligence, special talents, and personality pattern.

Some children, usually of the lower socio-economic classes, may react by overt aggressions and hostility

directed toward their own group or members of the dominant group.³ Anti-social and delinquent behavior may often be interpreted as reactions to these racial frustrations. These reactions are self-destructive in that the larger society not only punishes those who commit them, but often interprets such aggressive and anti-social behavior as justification for continuing prejudice and segregation.

Middle class and upper class minority group children are likely to react to their racial frustrations and conflicts by withdrawal and submissive behavior. Or, they may react with compensatory and rigid conformity to the prevailing middle class values and standards and an aggressive determination to succeed in these terms in spite of the handicap of their minority status.

The report indicates that minority group children of all social and economic classes often react with a generally defeatist attitude and a lowering of personal ambitions. This, for example, is reflected in a lowering of pupil morale and a depression of the educational aspiration level among minority group children in segregated schools. In producing such effects, segregated schools impair the ability of the child to profit from the educational opportunities provided him.

Many minority group children of all classes also tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist.

³ Brenman, M., The Relationship Between Minority Group Identification in A Group of Urban Middle Class Negro Girls, *J. Soc. Psychol.*, 1940, 11, 171-197; Brenman, M., Minority Group Membership and Religious, Psychosexual and Social Patterns in A Group of Middle-Class Negro Girls, *J. Soc. Psychol.*, 1940, 12, 179-196; Brenman, M., Urban Lower-Class Negro Girls, *Psychiatry*, 1943, 6, 307-324; Davis, A., The Socialization of the American Negro Child and Adolescent, *J. Negro Educ.*, 1939, 8, 264-275.

The report concludes that while the range of individual differences among members of a rejected minority group is as wide as among other peoples, the evidence suggests that all of these children are unnecessarily encumbered in some ways by segregation and its concomitants.

With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The culture permits and, at times, encourages them to direct their feelings of hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups.⁴

The report indicates further that confusion, conflict, moral cynicism, and disrespect for authority may arise in majority group children as a consequence of being taught the moral, religious and democratic principles of the brotherhood of man and the importance of justice and fair play by the same persons and institutions who, in their support of racial segregation and related practices, seem to be acting in a prejudiced and discriminatory manner. Some individuals may attempt to resolve this conflict by intensifying their hostility toward the minority group. Others may react by guilt feelings which are not necessarily reflected in more humane attitudes toward the minority group. Still

⁴ Adorno, T. W.; Frenkel-Brunswik, E.; Levinson, D. J.; Sanford, R. N., *The Authoritarian Personality*, 1951.

others react by developing an unwholesome, rigid, and uncritical idealization of all authority figures—their parents, strong political and economic leaders. As described in *The Authoritarian Personality*,⁵ they despise the weak, while they obsequiously and unquestioningly conform to the demands of the strong whom they also, paradoxically, subconsciously hate.

With respect to the setting in which these difficulties develop, the report emphasized the role of the home, the school, and other social institutions. Studies⁶ have shown that from the earliest school years children are not only aware of the status differences among different groups in the society but begin to react with the patterns described above.

Conclusions similar to those reached by the Mid-century White House Conference Report have been stated by other social scientists who have concerned themselves with this problem. The following are some examples of these conclusions:

Segregation imposes upon individuals a distorted sense of social reality.⁷

⁵ Adorno, T. W.; Frenkel-Brunswik, E.; Levinson, D. J.; Sanford, R. N., *The Authoritarian Personality*, 1951.

⁶ Clark, K. B. & Clark, M. P., Emotional Factors in Racial Identification and Preference in Negro Children, *J. Negro Educ.*, 1950, 19, 341-350; Clark, K. B. & Clark, M. P., Racial Identification and Preference in Negro Children, *Readings in Social Psychology*, Ed. by Newcomb & Hartley, 1947; Radke, M.; Trager, H.; Davis, H., Social Perceptions and Attitudes of Children, *Genetic Psychol. Monog.*, 1949, 40, 327-447; Radke, M.; Trager, H.; Children's Perceptions of the Social Role of Negroes and Whites, *J. Psychol.*, 1950, 29, 3-33.

⁷ Reid, Ira, What Segregated Areas Mean; Brameld, T., Educational Cost, *Discrimination and National Welfare*, Ed. by MacIver, R. M., 1949.

Segregation leads to a blockage in the communications and interaction between the two groups. Such blockages tend to increase mutual suspicion, distrust and hostility.⁸

Segregation not only perpetuates rigid stereotypes and reinforces negative attitudes toward members of the other group, but also leads to the development of a social climate within which violent outbreaks of racial tensions are likely to occur.⁹

We return now to the question, deferred earlier, of what it is about the total society complex of which segregation is one feature that produces the effects described above—or, more precisely, to the question of whether we can justifiably conclude that, as only one feature of a complex social setting, segregation is in fact a significantly contributing factor to these effects.

To answer this question, it is necessary to bring to bear the general fund of psychological and sociological knowledge concerning the role of various environmental influences in producing feelings of inferiority, confusions in personal roles, various types of basic personality structures and the various forms of personal and social disorganization.

On the basis of this general fund of knowledge, it seems likely that feelings of inferiority and doubts about personal worth are attributable to living in an underprivileged environment only insofar as the latter is itself perceived as an indicator of low social status and as a symbol of inferiority. In other words, one of the important determinants in producing such feelings is the awareness of social status difference. While there are many other factors that serve as reminders of the differences in social status, there can be little doubt that the fact of enforced segregation is a major factor.¹⁰

⁸ Frazier, E., *The Negro in the United States*, 1949; Krech, D. & Crutchfield, R. S., *Theory and Problems of Social Psychology*, 1948; Newcomb, T., *Social Psychology*, 1950.

⁹ Lee, A. McClung and Humphrey, N. D., *Race Riot*, 1943.

¹⁰ Frazier, E., *The Negro in the United States*, 1949; Myrdal, G., *An American Dilemma*, 1944.

This seems to be true for the following reasons among others: (1) because enforced segregation results from the decision of the majority group without the consent of the segregated and is commonly so perceived; and (2) because historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.

In addition, enforced segregation gives official recognition and sanction to these other factors of the social complex, and thereby enhances the effects of the latter in creating the awareness of social status differences and feelings of inferiority.¹¹ The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the State—the school or the school board, in this instance—in the same manner. Given both the ordinary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an official expression of the latter.

Not all of the psychological traits which are commonly observed in the social complex under discussion can be related so directly to the awareness of status differences—which in turn is, as we have already noted, materially contributed to by the practices of segregation. Thus, the low level of aspiration and defeatism so commonly observed in segregated groups is undoubtedly related to the level of self-evaluation; but it is also, in some measure, related among other things to one's expectations with regard to opportunities for achievement and, having achieved, to the opportunities for making use of these achievements. Similarly, the hypersensitivity and anxiety displayed by many minority group children about their

¹¹ Reid, Ira, What Segregated Areas Mean, *Discrimination and National Welfare*, Ed. by MacIver, R. M., 1949.

relations with the larger society probably reflects their awareness of status differences; but it may also be influenced by the relative absence of opportunities for equal status contact which would provide correctives for prevailing unrealistic stereotypes.

The preceding view is consistent with the opinion stated by a large majority (90%) of social scientists who replied to a questionnaire concerning the probable effects of enforced segregation under conditions of equal facilities. This opinion was that, regardless of the facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group.¹²

Similar considerations apply to the question of what features of the social complex of which segregation is a part contribute to the development of the traits which have been observed in majority group members. Some of these are probably quite closely related to the awareness of status differences, to which, as has already been pointed out, segregation makes a material contribution. Others have a more complicated relationship to the total social setting. Thus, the acquisition of an unrealistic basis for self-evaluation as a consequence of majority group membership probably reflects fairly closely the awareness of status differences. On the other hand, unrealistic fears and hatreds of minority groups, as in the case of the converse phenomenon among minority group members, are probably significantly influenced as well by the lack of opportunities for equal status contact.

With reference to the probable effects of segregation under conditions of equal facilities on majority group members, many of the social scientists who responded to the poll in the survey cited above felt that the evidence is

¹² Deutscher, M. and Chein, I., *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, *J. Psychol.*, 1948, 26, 259-287.

less convincing than with regard to the probable effects of such segregation on minority group members, and the effects are possibly less widespread. Nonetheless, more than 80% stated it as their opinion that the effects of such segregation are psychologically detrimental to the majority group members.¹³

It may be noted that many of these social scientists supported their opinions on the effects of segregation on both majority and minority groups by reference to one or another or to several of the following four lines of published and unpublished evidence.¹⁴ First, studies of children throw light on the relative priority of the awareness of status differentials and related factors as compared to the awareness of differences in facilities. On this basis, it is possible to infer some of the consequences of segregation as distinct from the influence of inequalities of facilities. Second, clinical studies and depth interviews throw light on the genetic sources and causal sequences of various patterns of psychological reaction; and, again, certain inferences are possible with respect to the effects of segregation *per se*. Third, there actually are some relevant but relatively rare instances of segregation with equal or even superior facilities, as in the cases of certain Indian reservations. Fourth, since there are inequalities of facilities in racially and ethnically homogeneous groups, it is possible to infer the kinds of effects attributable to such inequalities in the absence of effects of segregation and, by a kind of subtraction to estimate the effects of segregation *per se* in situations where one finds both segregation and unequal facilities.

¹³ Deutscher, M. and Chein, I., The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, *J. Psychol.*, 1948, 26, 259-287.

¹⁴ Chein, I., What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, *International J. Opinion and Attitude Res.*, 1949, 2, 229-234.

III

Segregation is at present a social reality. Questions may be raised, therefore, as to what are the likely consequences of desegregation.

One such question asks whether the inclusion of an intellectually inferior group may jeopardize the education of the more intelligent group by lowering educational standards or damage the less intelligent group by placing it in a situation where it is at a marked competitive disadvantage. Behind this question is the assumption, which is examined below, that the presently segregated groups actually are inferior intellectually.

The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences.¹⁵ It has been found, for instance, that the differences between the average intelligence test scores of Negro and white children decrease, and the overlap of the distributions increases, proportionately to the number of years that the Negro children have lived in the North.¹⁶ Related studies have shown that this change cannot be explained by the hypothesis of selective migration.¹⁷ It seems clear, therefore, that fears based on the assumption of innate racial differences in intelligence are not well founded.

It may also be noted in passing that the argument regarding the intellectual inferiority of one group as compared to another is, as applied to schools, essentially an

¹⁵ Klineberg, O., *Characteristics of American Negro*, 1945; Klineberg, O., *Race Differences*, 1936.

¹⁶ Klineberg, O., *Negro Intelligence and Selective Migration*, 1935.

¹⁷ Klineberg, O., *Negro Intelligence and Selective Migration*, 1935.

argument for homogeneous groupings of children by intelligence rather than by race. Since even those who believe that there are innate differences between Negroes and whites in America in average intelligence grant that considerable overlap between the two groups exists, it would follow that it may be expedient to group together the superior whites and Negroes, the average whites and Negroes, and so on. Actually, many educators have come to doubt the wisdom of class groupings made homogeneous solely on the basis of intelligence.¹⁸ Those who are opposed to such homogeneous grouping believe that this type of segregation, too, appears to create generalized feelings of inferiority in the child who attends a below average class, leads to undesirable emotional consequences in the education of the gifted child, and reduces learning opportunities which result from the interaction of individuals with varied gifts.

A second problem that comes up in an evaluation of the possible consequences of desegregation involves the question of whether segregation prevents or stimulates interracial tension and conflict and the corollary question of whether desegregation has one or the other effect.

The most direct evidence available on this problem comes from observations and systematic study of instances in which desegregation has occurred. Comprehensive reviews of such instances ¹⁹ clearly establish the fact that desegrega-

¹⁸ Brooks, J. J., *Interage Grouping on Trial-Continuous Learning*, *Bulletin #87, Association for Childhood Education*, 1951; Lane, R. H., *Teacher in Modern Elementary School*, 1941; Educational Policies Commission of the National Education Association and the American Association of School Administration Report in *Education For All Americans*, published by the N. E. A. 1948.

¹⁹ Delano, W., *Grade School Segregation: The Latest Attack on Racial Discrimination*, *Yale Law Journal*, 1952, 61, 5, 730-744; Rose, A., *The Influence of Legislation on Prejudice*; Chapter 53 in *Race Prejudice and Discrimination*, Ed. by Rose, A., 1951; Rose, A., *Studies in Reduction of Prejudice*, Amer. Council on Race Relations, 1948.

tion has been carried out successfully in a variety of situations although outbreaks of violence had been commonly predicted. Extensive desegregation has taken place without major incidents in the armed services in both Northern and Southern installations and involving officers and enlisted men from all parts of the country, including the South.²⁰ Similar changes have been noted in housing²¹ and industry.²² During the last war, many factories both in the North and South hired Negroes on a non-segregated, non-discriminatory basis. While a few strikes occurred, refusal

²⁰ Kenworthy, E. W., *The Case Against Army Segregation*, *Annals of the American Academy of Political and Social Science*, 1951, 275, 27-33; Nelson, Lt. D. D., *The Integration of the Negro in the U. S. Navy*, 1951; *Opinions About Negro Infantry Platoons in White Companies in Several Divisions*, *Information and Education Division, U. S. War Department, Report No. B-157*, 1945.

²¹ Conover, R. D., *Race Relations at Codornices Village, Berkeley-Albany, California: A Report of the Attempt to Break Down the Segregated Pattern on A Directly Managed Housing Project*, Housing and Home Finance Agency, Public Housing Administration, Region I, December 1947 (mimeographed); Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment*, 1951; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects: A Guide for Local Housing Authorities on How to Do It*, Public Housing Administration, New York Field Office (mimeographed)

²² Minard, R. D., *The Pattern of Race Relationships in the Pochontas Coal Field*, *J. Social Issues*, 1952, 8, 29-44; Southall, S. E., *Industry's Unfinished Business*, 1951; Weaver, G. L-P, *Negro Labor, A National Problem*, 1941.

by management and unions to yield quelled all strikes within a few days.²³

Relevant to this general problem is a comprehensive study of urban race riots which found that race riots occurred in segregated neighborhoods, whereas there was no violence in sections of the city where the two races lived, worked and attended school together.²⁴

Under certain circumstances desegregation not only proceeds without major difficulties, but has been observed to lead to the emergence of more favorable attitudes and friendlier relations between races. Relevant studies may be cited with respect to housing,²⁵ employment,²⁶ the armed

²³ Southall, S. E., *Industry's Unfinished Business*, 1951; Weaver, G. L-P, *Negro Labor, A National Problem*, 1941.

²⁴ Lee, A. McClung and Humphrey, N. D., *Race Riot*, 1943; Lee, A. McClung, *Race Riots Aren't Necessary*, *Public Affairs Pamphlet*, 1945.

²⁵ Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment*, 1951; Merton, R. K.; West, P. S.; Jahoda, M., *Social Fictions and Social Facts: The Dynamics of Race Relations in Hilltown*, Bureau of Applied Social Research Columbia, Univ., 1949 (mimeographed); Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How To Do It.*, Public Housing Administration, New York Field Office (mimeographed); Wilner, D. M.; Walkley, R. P.; and Cook, S. W., *Intergroup Contact and Ethnic Attitudes in Public Housing Projects*, *J. Social Issues*, 1952, 8, 45-69.

²⁶ Harding, J., and Hogrefe, R., *Attitudes of White Department Store Employees Toward Negro Co-workers*, *J. Social Issues*, 1952, 8, 19-28; Southall, S. E., *Industry's Unfinished Business*, 1951; Weaver, G. L-P., *Negro Labor, A National Problem*, 1941.

services²⁷ and merchant marine,²⁸ recreation agency,²⁹ and general community life.³⁰

Much depends, however, on the circumstances under which members of previously segregated groups first come in contact with others in unsegregated situations. Available evidence suggests, first, that there is less likelihood of unfriendly relations when the change is simultaneously introduced into all units of a social institution to which it is applicable—*e.g.*, all of the schools in a school system or all of the shops in a given factory.³¹ When factories introduced Negroes in only some shops but not in others the prejudiced workers tended to classify the desegregated

²⁷ Kenworthy, E. W., *The Case Against Army Segregation, Annals of the American Academy of Political and Social Science*, 1951, 275, 27-33; Nelson, Lt. D. D., *The Integration of the Negro in the U. S. Navy*, 1951; Stouffer, S., et al., *The American Soldier*, Vol. I, Chap. 19, A Note on Negro Troops in Combat, 1949; Watson, G., *Action for Unity*, 1947; Opinions About Negro Infantry Platoons in White Companies in Several Divisions, *Information and Education Division, U. S. War Department, Report No. B-157*, 1945.

²⁸ Brophy, I. N., *The Luxury of Anti-Negro Prejudice, Public Opinion Quarterly*, 1946, 9, 456-466 (Integration in Merchant Marine); Watson, G., *Action for Unity*, 1947.

²⁹ Williams, D. H., *The Effects of an Interracial Project Upon the Attitudes of Negro and White Girls Within the Young Women's Christian Association*, Unpublished M. A. thesis, Columbia University, 1934.

³⁰ Dean, J. P., *Situational Factors in Intergroup Relations: A Research Progress Report*. Paper Presented to American Sociological Society, 12/28/49 (mimeographed); Irish, D. P., *Reactions of Residents of Boulder, Colorado, to the Introduction of Japanese Into the Community, J. Social Issues*, 1952, 8, 10-17.

³¹ Minard, R. D., *The Pattern of Race Relationships in the Pocahontas Coal Field, J. Social Issues*, 1952, 8, 29-44; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How to Do It*, Public Housing Administration, New York Field Office (mimeographed).

shops as inferior, "Negro work." Such objections were not raised when complete integration was introduced.

The available evidence also suggests the importance of consistent and firm enforcement of the new policy by those in authority.³² It indicates also the importance of such factors as: the absence of competition for a limited number of facilities or benefits;³³ the possibility of contacts which permit individuals to learn about one another as individuals;³⁴ and the possibility of equivalence of positions and functions among all of the participants within the unsegregated situation.³⁵ These conditions can generally be satisfied in a number of situations, as in the armed services, public housing developments, and public schools.

³² Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment*, 1951; Feldman, H., *The Technique of Introducing Negroes Into the Plant, Personnel*, 1942, 19, 461-466; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How to Do It*, Public Housing Administration, New York Field Office (mimeographed); Southall, S. E., *Industry's Unfinished Business*, 1951; Watson, G., *Action for Unity*, 1947.

³³ Lee, A. McClung and Humphrey, N. D., *Race Riot*, 1943; Williams, R., Jr., *The Reduction of Intergroup Tensions*, Social Science Research Council, New York, 1947; Windner, A. E., *White Attitudes Towards Negro-White Interaction In An Area of Changing Racial Composition*. Paper Delivered at the Sixtieth Annual Meeting of the American Psychological Association, Washington, September 1952.

³⁴ Wilner, D. M.; Walkley, R. P.; and Cook, S. W., *Intergroup Contact and Ethnic Attitudes in Public Housing Projects*, *J. Social Issues*, 1952, 8, 45-69.

³⁵ Allport, G. W., and Kramer, B., *Some Roots of Prejudice*, *J. Psychol.*, 1946, 22, 9-39; Watson, J., *Some Social and Psychological Situations Related to Change in Attitude*, *Human Relations*, 1950, 3, 1.

IV

The problem with which we have here attempted to deal is admittedly on the frontiers of scientific knowledge. Inevitably, there must be some differences of opinion among us concerning the conclusiveness of certain items of evidence, and concerning the particular choice of words and placement of emphasis in the preceding statement. We are nonetheless in agreement that this statement is substantially correct and justified by the evidence, and the differences among us, if any, are of a relatively minor order and would not materially influence the preceding conclusions.

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APPENDIX B

The Five Questions

The cases for the states of Kansas, South Carolina, Virginia and Delaware were argued before the Supreme Court December 9-11, 1952. On June 8, 1953, the Court entered an order for reargument for the next October. The lawyers for both sides and the U.S. Attorney General were asked to file briefs dealing with the following five questions:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand that it would abolish segregation in public schools?
2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment:
 - a. That future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or,
 - b. That it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?
4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment:
 - a. Would a decree necessarily follow providing that, within the limits set by normal geographic school districting Negro children should forthwith be admitted to schools of their choice, or
 - b. May this Court, in the exercise of its equity powers, permit an effective gradual adjustment

to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4 (a) and (b) are based and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

- a. Should this Court formulate detailed decrees in these cases;
- b. If so, what specific issues should the decrees reach;
- c. Should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
- d. Should this Court remand to the Courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the Courts of first instance follow in arriving at the specific terms of more detailed decrees?